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GENERAL INDEX  
OF THE  
INDIAN LAW REPORTS  
ALLAHABAD SERIES

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT ALLAHABAD AND BY  
THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL  
ON APPEAL FROM THAT COURT.

REPORTED BY:

*Privy Council ...* ... A. M. TALBOT, *Inner Temple,*  
*High Court, Allahabad ...* B. K. MUKERJEE, M.A., LL.B.,  
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VOLUME LI—1929.

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ALLAHABAD:

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# CORRIGENDA.

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- Page 675, line 13, for "Plaitiffs" read "Plaintiffs".
- Page 675, line 2, from bottom, for "John" read "Sir John".
- Page 688, line 19, for "Rs. 35,00" read "Rs. 35,000".
- Page 689, line 7, for "Rs. 2,32" read "Rs. 2,325".
- Page 698, line 19, omit the comma after "Company".
- Page 705, line 10 from bottom, for "does no" read "does not".
- Page 729, footnote, for "Ch., W., "read "Ch. D.,".
- Page 735, side margin, for "Boys, J." read "King, J".
- Page 741, line 6 from bottom, for " o rthe" read "or the".
- Page 746, line 15 from bottom, for "annual" read "annul".
- Page 810, line 18, omit "to obtain".
- Page 820, footnote No. (3), for "321" read "331".
- Page 821, line 21 from bottom, for 1292F." read "of 1292F.".
- Page 828, line 9, for "Mardas" read "Madras".
- Page 839, line 1, omit the full stop after "Lindley".
- Page 855, line 12, for "followed" read "following".
- Page 870, line 12, for "aginst" read "against".
- Page 874, line 11 from bottom, for "endnig" read "ending".
- Page 926, line 15, omit "to".
- Page 969, line 10, for "deed" read "deeds".
- Page 998, line 23, for "slit" read "suit".

JUDGES OF THE HIGH COURT OF JUDICATURE  
AT ALLAHABAD.

1929.

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(Officiated from 27th May up to 26th July).

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1929.

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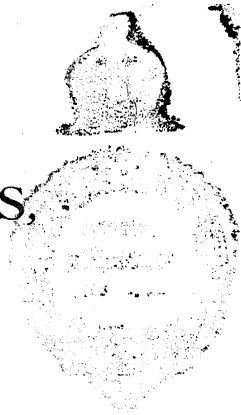
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THE  
INDIAN LAW REPORTS,  
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APPELLATE CIVIL.



*Before Mr. Justice Sen and Mr. Justice Niamat-ullah.*

RAM KALI (PLAINTIFF) *v.* KHAMMAN LAL AND OTHERS  
(DEFENDANTS).\*

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June, 18.

*Hindu law—Joint family—Partition—Facts necessary to constitute separation—Intention of members.*

Partition is the severance of the status of a joint family, which may be effected by the exercise of individual volition indicating an intention to separate from the other members of the family.

The said intention must be manifested clearly and unambiguously.

The intention to separate may be established either by explicit declaration or from an uniform and consistent course of conduct of the party concerned or of other members of the family. The intention may be declared orally or in writing, and may manifest itself from the filing of a plaint for partition, from an application for mutation of names to the Tahsildar in specific shares with a view to separate enjoyment, from a written notice served upon the members of the family demanding a partition of the property, from an agreement executed by the various members of the family whereby the shares of the individual members are defined with the object

\*First Appeal No. 340 of 1925, from a decree of Ganga Nath, Subordinate Judge of Moradabad, dated the 5th of May, 1925.

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of securing separate enjoyment of the profits, or from an agreement of reference to arbitration for the partition of the property. Instances like these may be enumerated but cannot be exhausted.

It is not necessary that there should be a consensus or agreement among the coparceners for the severance of status of a joint family.

Where severance is effected by explicit declaration, the result is decisive, and the legal result cannot be affected or controlled by the subsequent conduct of the parties.

In the absence of an explicit declaration, an inference in support of the intention may be drawn from evidence of conduct which will necessarily be different according to the varying postures of each case.

Where there is evidence of intention to separate, this can only be annulled by clear evidence of the renunciation of such intention, and, in some cases, by consensus or agreement on the part of the members of the family to reunite.

Partition may also result from a definement or ascertainment of shares with a view to separate enjoyment of property.

The separation of one member of a coparcenary is not necessarily a separation of the other members *inter se*.

*Baboo Doorga Pershad v. Mussumat Kundun Koowar* (1), *Appovier v. Rama Subba Aiyar* (2), *Parbati v. Naunihal Singh* (3), *Palani Ammal v. Muthuvenkatachala Moniagar* (4), *Suraj Narain v. Iqbal Narain* (5), *Jai Narain Rai v. Baijnath Rai* (6), *Ramalinga Annavi v. Narayana Annavi* (7), *Mukund Dharman Bhoir v. Balkrishna Padmanji* (8), *Joy Narain Giri v. Girish Chunder Myti* (9), *Girja Bai v. Sadashiv Dhundiraj* (10), *Kawal Nain v. Budh Singh* (11), *Challa Lakshmakka v. Challa Bala Rangappa* (12), *Periaswami Nainar v. Kandasami Nainar* (13), *Syed Kasam v. Jorawar Singh* (14), *Kedar Nath v. Ratan Singh* (15) and *Balkishen Das v. Ram Narain Sahu* (16), referred to.

(1) (1873) L.R., 1 I.A., 55.

(3) (1909) I.L.R., 31 All., 412.

(5) (1912) I.L.R., 35 All., 80.

(7) (1922) I.L.R., 45 Mad., 489.

(9) (1878) I.L.R., 4 Calc., 434.

(11) (1917) I.L.R., 39 All., 496.

(13) (1925) 99 Indian Cases, 720.

(15) (1910) I.L.R., 32 All., 415.

(2) (1866) 11 Moo. I.A., 75.

(4) (1917) 33 M.L.J., 759; and  
(1924) I.L.R., 48 Mad., 254.

(6) (1928) I.L.R., 50 All., 615.

(8) (1927) I.L.R., 52 Bom., 8.

(10) (1916) I.L.R., 43 Calc., 1031.

(12) (1925) 91 Indian Cases, 285.

(14) (1922) I.L.R., 50 Calc., 84.

(16) (1903) I.L.R., 30 Calc., 738.

THE facts of this case were as follows :—

The plaintiffs sued for a declaration that one Lal Kunja Mal was a separated Hindu who owned a one-sixth share in the zamindari and house properties scheduled in the plaint, and that a deed of partition, dated the 14th of June, 1917, executed and completed by the principal defendants, and several items of transfer made by some of them, were void and ineffectual as against the reversionary heirs of Kunja Mal.

The common ancestor of the family was one Nain Sukh. Kunja Mal was one out of six sons of Nain Sukh. He had a son, Faqir Chand, who predeceased him, leaving a widow, Musammat Bishan Dei. It was not known when Faqir Chand died. Kunja Mal died on the 10th or 11th of April, 1915, leaving a widow, Musammat Gendo (defendant No. 26), and a daughter, Musammat Ramkali (original plaintiff No. 1). Plaintiffs Nos. 2 and 3 were the minor sons of Ramkali by Lala Ram Chandra Sahai, and were not in existence at the time of Kunja Mal's death. On the 14th of June, 1917, a formal deed of partition was drawn up by the various members of the family, which stated that the family of Nain Sukh Mal had continued joint right up to that date; that the parties considered it desirable to separate; that, therefore, they divided the property in certain shares, and made a grant of certain properties to Musammat Gendo and Musammat Bishan Dei for their maintenance.

The plaintiffs repudiated the statement contained in the partition deed, dated the 14th of June, 1917, and complained that the document was fraudulent and collusive; that the recital that the family was still joint was wrong to the knowledge of the members of the family, and that the main object of the said document was to deprive the reversionary heirs of Kunja Mal of their rights of inheritance in the estate left by him.

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The material averments of the plaintiffs were to the effect that on the 30th of September, 1907, Kunja Mal and his two brothers, Khamman Lal, defendant No. 1, and Hira Lal, defendant No. 2, and the sons of the other three brothers of Kunja Mal executed a document whereby they appointed certain arbitrators to divide the entire property amongst all the six branches descended from Nain Sukh Mal; that, "although the business, residence, etc., of the above-named persons were already separate, the said arbitration agreement made the family publicly separate and divided, and every one enjoyed his own property and income; but the arbitrators did not record the award advisedly"; and that Kunja Mal died as a member of a divided family.

Defendants Nos. 1 and 2 were the surviving sons of Nain Sukh Mal. Defendants 3 to 10 were the sons and grandsons of defendant No. 2. Defendants 11 to 13 were the sons of Gulab Rai, who was a brother of Kunja Mal. Defendants 14 to 18 and 39 were descended from Prabhu Lal, and defendants 19 to 25 were descended from Ganeshi Lal. Defendant 26 was the widow of Kunja Mal, and defendant 27 was the widow of Faqir Chand. Defendants 28 to 38 and 40 to 42 were transferees of portions of the property in dispute from defendants 5, 11 and 19.

The suit was contested by defendants 1, 2, 3, 4, 6, 11 to 14, 17, 19, 21 to 23, 27, 34, 37 and 38 upon a variety of grounds, most of which were repelled by the trial court and were not repeated in the High Court.

The suit was dismissed on the short ground that Kunja Mal was not separate from his brothers and nephews at the time of his death. Plaintiff No. 1 appealed; but during the pendency of the appeal she died, and the appeal was continued by her minor sons, Kesho Saran and Om Prakash, under the guardianship of their father Lala Ram Chandra Sahai.

Dr. Kailas Nath Katju and Munshi Shambhu Nath Seth, for the appellants.

Babu Piari Lal Banerji and Pandit Narmadeshwar Prasad Upadhiya, for the respondents.

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The judgement of the Court (SEN and NIAMAT-ULLAH, JJ.), after stating the facts as above, thus continued :—

It has been contended for the appellant that the agreement of reference to arbitration, dated the 30th of September, 1907, indicated a demand for partition and amounted to an unequivocal and unambiguous intention on the part of Kunja Mal and the five other branches of the family to effect a complete severance of the joint status and to bring about a detailed partition of the family property, and that the legal effect of this document was a disruption of the joint family.

It is next argued on the merits that although the arbitrators did not make a formal award, they did as a matter of fact divide the family property, or, at any rate, a considerable portion thereof.

The agreement, dated the 30th of September, 1907, is a registered instrument, which appears to have been prepared with deliberation and care. The parties to this document are Khamman Lal, first party; Kunja Mal, second party; Hira Lal, third party; Ram Chandra for self and as guardian of Lakhshmi Narain, and Bhola-nath, fourth party; Jhanjhan Rai and Kundan Lal, fifth party; and Shadi Lal for self and as guardian of Gilla Mal, his own brother, sixth party.

A reference to the genealogical table at page 12 of the Paper Book will show that each of these six parties was under the Hindu law entitled, on partition, to a one-sixth share in the joint ancestral estate.

The words of this document leave no room for doubt that the parties intended at the time to completely divide

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the estate, and this intention has been expressed without equivocation or mental reservation. The following quotation is useful:—"We, the parties, have, owing to the family being a joint Hindu family, been the owners and partners in equal shares of all the movable and immovable properties, sugar manufacturing business, money dealings, cash etc. up to this time, but owing to certain reasons we wish to divide all the existing effects; but dissolution of partnership and division of movable and immovable properties cannot be made by ourselves . . . We have appointed Lala Newal Kishor, Lala Chhote Lal and Lala Munna Lal as our arbitrators for settlement of disputes and division of all the effects such as immovable properties, all the movables, *sir* and *khudkasht* lands and groves. We, therefore, covenant that the above-named arbitrators should divide all the houses, shops, zamindari properties, self-acquired and held under mortgage, sugar business at the manufactories, money dealings, bonds registered and unregistered, outstanding debts, existing cash, and pawned ornaments, detailed as below, either in equal or disproportionate shares as it may be possible, and put each party in separate possession of the same." The agreement proceeds to give detailed instructions to the arbitrators as to the mode in which the partition should be effected. A list of the entire property available for partition is annexed to the document. The document was signed by all the parties and was attested by a number of witnesses; it was presented for registration by all the adult members and was eventually registered.

There can be no doubt that the parties, on the date of the execution of this instrument, had a clear intention to separate, and, even if matters did not go any further, from this point of time onwards Lala Kunja Mal must, in the eye of the law, be taken to be a separated Hindu.

The above view is supported by a long array of decided cases, which will be referred to at the proper place and the result of judicial decisions summarized.

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Of the arbitrators, Chhote Lal was a resident of Chamrawa and the other two belonged to Hasanpur and Mahmudpur. It is a matter of common knowledge that great care and circumspection are exercised in the selection of arbitrators; and before the formal execution of any agreement of reference, the persons selected to act as arbitrators are as a rule approached and consulted by the parties concerned with a view to obtain their willingness to act. Without violence, it may be presumed that this procedure must have been adopted in the present case.

An instrument of reference to arbitration to divide joint family property is a transaction of the most solemn character. The parties must be taken to be fully alive to its importance, scope and legal effect. Where all the branches of a family having pecuniary or proprietary interest in different kinds of property of considerable value unite in their demand for partition of the family estate, prepare an elaborate list of the entire property including movables and immovables with details of bonds, specifying the names of the debtors, the amounts due and the dates of their execution, and detailed instructions are given to the arbitrators to divide houses, shops, zamindari properties, groves, *sir* and *khudkasht* lands, sugar business, outstanding debts, existing cash or effects and pawned ornaments, it should, indeed, be extremely difficult to hold that the document was intended to be no more than a paper transaction, and that the intention of the executants was different from what the document itself peals out in ringing notes. The parties could not have employed more emphatic language to declare their intention to separate.

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It was in the contemplation of the parties that the agreement of reference should culminate in a written award. It is possible that for some reason or other the arbitration fell through. The arbitrators may have refused to act. Difficulties may have arisen in bringing together all the three arbitrators, who were residents of three different places. The other members of the family may have realized the disadvantage resulting from the separation of Kunja Mal and Khamman Lal, who had no male issue, and may have employed obstructive tactics and exerted their influence to prevent the progress of the arbitration proceedings. But all this is speculation. We have this solid fact that the reference did not materialize in a written award.

The agreement of reference does not specify the state of things which led to its execution. All it says is, "owing to certain reasons we wish to divide all the existing effects." The written statements are silent on the point. Those of Khamman Lal, defendant No. 1, and Jhanjhan Rai, defendant No. 4, state as follows:— "Merely the arbitration agreement, relied on by the plaintiffs, never effected any partition among the members of the family. The members of the family never showed their intention directly and clearly, or in any other way; nor was any division or specification of shares ever made actually or independently; nor was there any change in the mode of management of the joint property" (Paragraph 8 of the additional pleas). "After the execution of the said agreement, the members of the family took no further steps regarding arbitration, or got no partition effected in any other way, and let the family remain joint as before" (Paragraph 9. "The arbitration agreement, with whatever intention it might have been written, was revoked at once with mutual consultation, and it ceased to have any effect thereafter. The parties to the said agreement could change their mind and

intention, and they did give up their former intention. Under the circumstances, even if the intention of partition is deemed to have effected separation according to law, which the defendants do not admit, still the immediate giving up of the intention and the continuance of jointness amount to re-union according to law" (Paragraph 10).

The difference between a "notional" partition or partition of a legal right and "actual" partition or partition of the subject to which the legal right attaches was clearly present in the mind of the defendants. It is remarkable that no issue was framed by the trial court as to whether the intention to separate was ever given up by Kunja Mal and others, and whether the sequence of events which followed the execution of the agreement of reference amounted to a re-union under the Hindu law.

\* \* \* \* \*

We hold that the story of an actual partition by the arbitrators has not been made out.

Matters have been complicated by the fact that neither party has come to court with a straightforward case. We feel inclined to hold that no award, written or verbal, was made by the arbitrators. The reason why the arbitration fell through will never be known. The chances are that strained relations between the parties preceded the execution of the agreement of reference; and the family differences continued, though these might have been patched up on certain emergencies for the common benefit of the parties, having regard to the gain of the moment.

The appellants chiefly relied upon the legal effect of this agreement.

In *Baboo Doorga Pershad v. Mussumat Kundun Koowar* (1) the respondent, who was the widow of a Jain banker of the Agarwala caste, claimed the estate by

(1) (1873) L.R., 1 I.A., 55.

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right of inheritance against the collaterals of her husband. The common ancestor of the plaintiff's husband and of the defendants was one Lala Chedi Lal. In 1851 Makhan Lal, who was the only surviving son of Chedi Lal, executed an *ekrarnama* along with the representatives of three deceased sons of the common ancestor, the terms of which have been set out at pages 56 to 58 of the report. By this *ekrarnama*, the interest of the four branches of the family was differentiated and defined, but no formal partition was effected, and the parties were content to share the profits and bear the losses in equal shares of one-fourth each. Applying the rule of law laid down in *Appovier v. Rama Subba Aiyan* (1), it was held that the family must be taken to have been separated in interest and title. Their Lordships declared that there might be a division of a joint and separate Hindu family and of the joint property without a regular partition by metes and bounds, and that the question in each case must be one of intention, which was to be inferred from the instruments executed and acts done. The peculiar feature of this case was that, by a common understanding, certain movables were kept in common, but four *chithas* had been drawn up and signed by all the parties concerned and that the accounts were kept as they would be kept between four ordinary partners, and not as they would be kept as between the members of a joint and undivided Hindu family. Thus, on the facts, this case is distinguishable and is not of material assistance to the plaintiff.

In *Parbati v. Naunihal Singh* (2), the respondent had instituted a suit for ejectment against Musammat Parbati, widow of his paternal uncle Dalip Singh, on the allegation that his father Nirmal Singh and Dalip Singh were members of a joint family, that Nirmal Singh died in 1861, that Dalip Singh died in 1899, and that the

(1) (1866) 11 Moo. I.A., 75.

(2) (1909) I.L.R., 31 All., 412.

plaintiff was the sole surviving member of the joint family. The defendant contested the suit on the ground that on or before the 13th of June, 1861, a partition had been effected in law, and that, on that date, Dalip Singh, Musammat Rani acting for self and also on behalf of her infant son Naunihal Singh, and Musammat Phool Kuer, the plaintiff's grandmother, addressed a petition to the Tahsildar for mutation of names in equal shares in favour of plaintiff and Dalip Singh. Their Lordships held that this constituted a partition of the joint family, that the plaintiff had acted upon the partition, that he had taken full advantage of it, and had never repudiated it during Dalip's lifetime. Reversing the judgement of the High Court the Judicial Committee held that Dalip Singh was a separated Hindu. It is clear, therefore, that where the shares of the individual members of the family, be they majors or minors, have been ascertained with the object of effecting a partition, it results in the disruption of the joint estate.

This view does not in any way militate against the later pronouncement of the Privy Council in *Palani Ammal v. Muthuvenkatachala Moniagar* (1), where their Lordships observed as follows:—"But the mere fact that the shares of the co-parceners have been ascertained does not by itself necessarily lead to an inference that the family had separated. There may be reasons other than a contemplated immediate separation for ascertaining what the shares of the co-parceners on a separation would be." But where the ascertainment of shares is made with the distinct object of partition or the separate enjoyment of the profits, it effects in law a partition of the property.

In *Suraj Narain v. Iqbal Narain* (2), the question turned upon the construction of a deed of compromise

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(1) (1924) I.L.R., 48 Mad., 251.

(2) (1912) I.L.R., 35 All., 80.



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dated the 27th of February, 1901. Their Lordships remarked as follows:—"What may amount to a separation, or what conduct on the part of some of the members may lead to a disruption, of the joint undivided family and convert a joint tenancy into a tenancy in common must depend on the facts of each case. A definite and unambiguous indication by one member to separate himself and to enjoy his share in severalty may amount to separation. But to have that effect the intention must be unequivocal and clearly expressed. In the present case, that element appears to their Lordships wholly wanting. By the compromise of February, the parties were agreed to retain the status of jointness which had existed till then 'until any dispute arose among the heirs'." Suraj Narain's statement that he separated a few months later was not accepted as an expression of an unambiguous intention to separate, and his oral evidence was rejected as inconclusive or unreliable. On the other hand his conduct, borne out by documents, went against his contention.

It is settled law that where there is an unambiguous intention to separate, partition is the inevitable result. Where, however, the expression of intention is clothed in ambiguous terms, the question of jointness or otherwise may be legitimately tested by an appeal to the conduct of the parties and by a reference to the surrounding circumstances. It has been held by this Court in *Jai Narain Rai v. Baijnath Rai* (1) that separation can be effected either by deeds or by acts, or both by deeds and acts. If the deed be unequivocal in its language and the intention of the parties is clear from it, it would not be necessary to prove acts in support of the deed.

In *Ramalinga Annavi v. Narayana Annavi* (2) their Lordships point out that "under the Hindu law it is open to the members of a joint family to make a division

(1) (1928) I.L.R., 50 All., 615.

(2) (1922) I.L.R., 45 Mad., 489.

and severance of interest in respect of a part of the joint estate, while retaining their status as a joint family and holding the rest as the properties of a joint and undivided family." In each case, the question will resolve itself into one of intention. There is nothing to prevent the members of a Hindu family upon grounds of expediency to divide off a portion of the joint family property and yet to continue the resolve of retaining the rest of the property in joint ownership as members of an undivided family. It is essentially a case of intention, and their Lordships point out that a disruption may ensue even by a notice being served by one member of the family upon the other members, clearly intimating an intention to separate.

Separation is the result of the exercise of individual volition, and is not dependent upon a consensus or consent of the other members of the coparcenary body. But some overt act is necessary for the expression of that intention. Intention may be expressed by declaration or may be gathered from the conduct of a particular member of a family such as his leaving the family roof, setting up a separate business, or asserting his claim to portions of the family property as his own, coupled with his conduct generally, if such conduct be inconsistent with his position as a member of an undivided family. The declaration or the conduct should be such as to convey an intimation to the other members of the family of a clear intention to separate.

In *Mukund Dharman Bhoir v. Balkrishna Padmanji* (1), the question for determination by the Judicial Committee was whether a document executed by Padman in the year 1907 had the effect of separating Padman and his two sons in status from the joint family, with a consequential partition of the joint family estate. On the date of the execution of the aforesaid document

(1) (1927) I.L.R., 52 Bom., 8.

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Padman did not know that there was a joint ancestral estate, owned by him and by his father. Padman was an idle and vicious young man of weak intellect, a burden to the family and incapable of assisting in the management of the family property. A portion of the family estate was allotted to him for his maintenance and he began to live separately. Their Lordships held that there was a twofold application of the word "division" in connection with partition. In the first place there is separation, which means the severance of the status of jointness. That is a matter of individual volition; and it must be shown that his intention to be divided has been clearly and unequivocally expressed, it may be by explicit declaration or by conduct. Secondly, there is the partition or division of the joint estate, comprising the allotment of shares, which may be effected by different methods. Their Lordships held that the deed of 1907 was not operative in effecting a separation.

The above case does not go against the appellant and is clearly distinguishable. Padman was not "separated" from the family in its legal or technical sense. His share in the joint family property was not ascertained, and no property was allotted to him as his share on partition. He was removed from the family as a good riddance, a dry crumb having been thrown out to him to satisfy his immediate wants.

One of the commonest ways of declaring the intention to separate is by the institution of a suit for partition. In *Appovier v. Rama Subba. Aiyar* (1) the dispute related to the estate of one Sita Ramiyan and his six sons who formed an undivided family. Trouble arose in 1806 when a temporary arrangement was made about the division of the family property. But the parceners continued to hold the property as joint property until 1830. On the 30th of September, 1830, an *ekrarnama*

(1) (1866) 11 Moo. I.A., 75.

was executed for a prospective division of the family villages at some future period as might be agreed on, with joint cultivation and engagement thereof in six equal shares in the meanwhile. On the 22nd of March, 1834, a more effective deed was executed, allotting properties in certain shares to the parties concerned. On the 11th of November, 1855, a suit for partition was instituted in which the document dated the 22nd of March, 1834, was challenged upon a variety of grounds. The plaintiff's case rested mainly upon the contention that the property in dispute belonged to an undivided family of which the plaintiff appellant was a member. Their Lordships overruled this contention with the following observations:—"But when the members of an undivided family agree among themselves with regard to a particular property that it shall thenceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share, which he may claim to receive and to enjoy in severalty, although the property itself has not been actually severed and divided." Their Lordships took into consideration the fact that there was no uniform or consistent course of decisions in India one way or the other: "Upon an examination of the cases it will be found that in some the deed of partition was not attended by any subsequent act and had been repudiated by the subsequent conduct of the parties; and in another of the cases cited, where there had been a decree of partition, it seems that the decree of partition had been abandoned." Their Lordships next proceed to lay down the general principles relating to partition:—"It is necessary to bear in mind the twofold application of the word 'division'. There may be a division of right and there may be a division of property; and thus after the

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execution of this instrument there was a division of right in the whole property, although, in some portions, that division of right was not intended to be followed up by an actual partition by metes and bounds, that being postponed till some future time when it would be convenient to make that partition." Their Lordships ruled that the effect of the agreement of the year 1834 was that the joint tenancy was severed and converted into a tenancy in common.

It follows from this that where the intention of the parties found its expression in an agreement to separate, it has the effect of bringing about a partition in law, although the *de facto* partition may not be carried out either immediately or even for years, as happened in this case.

In *Joy Narain Giri v. Girish Chunder Myti* (1) the joint family consisted of Joy Narain Giri and Shivaprosad Giri, who were the grandsons of one Mahant Nand Kishore. Shivaprosad quarrelled with Joy Narain as the latter had refused him any participation in the joint estate. He left the house in which they jointly resided, lived with his sister's husband and maintained himself with borrowed money. He sued Joy Narain for his half share and obtained a decree which provided that the date of separation from commensality was to be counted from *Baisakh*, 1272 *Fasli*. This decree was affirmed by the High Court in appeal. Joy Narain appealed to the Privy Council, during the pendency of which Shivaprosad Giri died. He was substituted by Girish Chunder, his sister's son, who claimed under a will made by Shivaprosad. The Privy Council dismissed the appeal. Then Joy Narain brought the present suit for a declaration that Shivaprosad died as a member who was joint in estate with Joy Narain and that, therefore, the partition decree enured for his benefit. The Privy Council held that

(1) (1878) I.L.R., 4 Cal., 431.

although the previous suit was not in terms for partition, the decree passed therein effectually destroyed the joint estate and the plaint indicated a distinct intention of obtaining a separation of estate, as regards both the real and personal property.

*Girja Bai v. Sadashiv Dhundiraj* (1) was an appeal to the Judicial Committee in a suit brought by one Harihar against the descendants of the common ancestor, Bapuji, for a declaration of his title to a third share in the joint ancestral property. On the 14th of February, 1902, Harihar and Jageshwar wrote to Dhundiraj, who had been introduced into the family by adoption, asking him to have a partition effected by arbitrators. On the 1st of October, 1908, Harihar served a registered notice on the first defendant, who was the manager of the joint family, communicating his intention to the defendants that he did not wish to continue as a joint member of the family. On the 19th of October the defendant, in his reply, tried to persuade Harihar to abandon his intention and added that, if he persisted, he had better make the partition himself, since he was senior to him. Harihar brought this suit three days after this. The District Judge directed the parties to appear before him in person to ascertain from them how the partition was to be effected. Their Lordships held that the notice dated the 1st of October, 1908, coupled with the partition suit amounted to a separation with all its legal consequences. In this case there was a persistence in the demand for partition, and all acts of Harihar, subsequent to the registered notice, indicated a firm resolution to separate.

In *Kawal Nain v. Budh Singh* (2), Prabhu Lal, one of the sons of Budh Singh, left his ancestral house and sued his father for partition. On the 19th of July, 1890, the suit was dismissed on a technical ground.

The elders of the community intervened; and by a

(1) (1916) I.L.R., 43 Calc., 1031. (2) (1917) I.L.R., 39 All., 496.

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private settlement a one-third share, to which Prabhu Lal was entitled, was allotted to him, although the name of Budh Singh continued in the revenue papers. On the 28th of August, 1890, Prabhu Lal executed a simple mortgage in favour of the predecessors of the appellant, Kawal Nain, and others. On the 22nd of August, 1910, a suit for enforcement of this mortgage was brought against Prabhu Lal; and the other members of the family were joined as defendants. These defendants resisted the suit on the ground that Prabhu Lal was a member of a joint family, and a mortgage by him of his share of the family properties was invalid. This plea prevailed in the High Court with RICHARDS, C. J., and BANERJI, J. The Privy Council reversed this decision on the short ground that by his plaint in the partition suit Prabhu Lal had claimed a fifth share of the family property, and that the claim amounted to an intimation to the defendants, his co-sharers, of his unequivocal desire to separate, and that the partition was effected by the commencement of the aforesaid suit. They further held that the status was altered by his assertion of his right to separate, whether he obtained a consequential judgement or not.

The learned advocate for the appellant contends before us that the same result should follow from an agreement of reference to arbitration for partition of the family property, where the intention to separate is clearly manifest from the document, and the circumstances that the arbitrators did not proceed with their duty, or made no partition in fact, or gave no award at all will in no way affect the legal consequences of the agreement. In principle there does not seem to be any difference between a plaint for partition filed in court and an agreement duly executed by the members of the joint family to divide the family property through the intervention of arbitrators. The crucial factor in each case is the intention of the

party or parties concerned. If the intention has been expressed in clear terms (no matter what the nature of the document might be,—a plaint or an agreement), the inevitable result is the termination of the joint status.

In *Joy Narain Giri's* case (1) their Lordships never intended to lay down the rule that the plaint in a suit for partition, indicating a distinct intention to separate, was not sufficient to effect separation until effect was given to that intention by the judgement passed in the case. It was a matter of coincidence in that case that the suit for partition succeeded and a judgement was entered in favour of the plaintiff. In *Kawal Nain's* case (2), in spite of the dismissal of the suit for partition on a technical ground, their Lordships held that the legal effect of the filing of the suit was partition, as the intention to separate had been expressed unequivocally in the plaint, and that was enough to effect a severance. The non-passing of a decree was immaterial, as a decree was necessary only for working out the result of the severance. The conscious withdrawal of a suit for partition leads to a different result from the erroneous dismissal of a suit for partition.

The case of *Challa Lakshmakka v. Challa Bala Rangappa* (3), presents up to a certain point some features of similarity. The property in suit belonged to four brothers, who executed a document, miscalled a *mukhtearnama*, appointing certain persons to act as arbitrators and effect a final division of the joint family properties. The material portion of this document was in these terms:—"Already, three years ago, not having been on good terms among ourselves, we were living separately and the lands and the debts due by us to outsiders were, however, held in common; but dispute having arisen among us thereby, we have appointed you this

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(1) (1878) I.L.R., 4 Calc., 434.

(2) (1917) I.L.R., 39 All., 496.

(3) (1925) 91 Indian Cases, 285.



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day for the purpose of putting a stop to our dispute and for finishing the division of our assets and liabilities. Therefore, we shall abide by the decision given by you." In this case the arbitrators entered upon their duties, made partition of certain properties, but gave "a joint share" to the plaintiff's husband. But before the arbitrators had entered upon the scene, disruption had already commenced by the act of the parties. These circumstances differentiate this case from the one in hand. The feature in common between the two cases is the agreement to refer to arbitration, and, although the terms of the document were not so clear nor the instructions so detailed and minute as in the present case, NAIR, J., held that a severance of interest was created by the document then before him.

In *Periaswami Nainar v. Kandasami Nainar* (1), during the progress of a partition suit, which had been instituted on the 23rd of April, 1919, three sets of defendants executed a registered instrument on the 28th of April, 1919, whereby they appointed five arbitrators to effect a partition of the entire property. Two of the arbitrators refused to act. On the 25th of July, 1919, a fresh document was executed in favour of five arbitrators to effect a partition of the family property. The partition suit itself had been preceded by a demand for partition in March, 1919, and the plaintiff had to borrow money for the prosecution of the suit. These circumstances evinced an intention to separate in a manner which cannot admit of any mistake. Their Lordships held that Vythi (the first defendant), equally with the plaintiff, wanted a partition to be made, that his demand was unequivocal and unambiguous, and that he had not gone back on his first decision for the partition of the property.

(1) (1925) 99 Indian Cases, 720.

A person executing an agreement of reference for the appointment of certain persons as arbitrators to divide the joint family property may have a *locus pœnitentiæ* and may abandon his intention where the other parties to the reference agree. It must be in very rare cases, if any, that the arbitrators should be justified in continuing the proceedings where all the parties to the reference are agreed that the proceedings are no longer necessary and that they are in favour of the conservation of the *status quo*. The mere fact that no award was given is wholly insufficient for any inference either that the party or parties concerned had renounced their intention to separate or that the family had become reunited.

In *Syed Kasam v. Jorawar Singh* (1), the respondents Nos. 1 to 6 formed a joint family with one Nain Singh, who died in 1906. Nain Singh had sold certain properties to Syed Kasam in 1902. The plaintiffs respondents claimed to recover these properties from the vendees on the allegation that the property belonged to the plaintiffs and Nain Singh as members of the joint family. In defence it was pleaded that Nain Singh had separated. On December 4th, 1905, all the members of the family executed an agreement appointing one Ghasi Ram as arbitrator to partition the property. Certain lists were drawn up by the arbitrators, but the formal division was not at once carried out, as Nain Singh died on March 26th, 1906. Effect, however, was given to the lists after his death. Their Lordships appear to have treated the agreement of reference to arbitration for effecting a partition upon the same footing as a plaint in a suit for division of joint family property, and held that Nain Singh having claimed his half share and having signed the deed of agreement, these were sufficient

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(1) (1922) I.L.R., 50 Calc. 84.

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to effect a severance in interest and to prevent the share of Nain Singh from passing by survivorship.

In *Kedar Nath v. Ratan Singh* (1), the facts were somewhat peculiar. Two estates in Oudh, before its annexation, were held by a joint Hindu family consisting of three brothers, Gayadin, the eldest, Umrao, the second, and Ratan, the youngest. These estates were confiscated by the Government, but subsequently one of the estates, namely Sherpur, was granted to Gayadin. The grant must be taken to have been made to all the three brothers as members of an undivided family, and it was so held by the courts in India and also by the Privy Council. In 1867 Umrao quarrelled with Gayadin, left the family house and brought a suit for partition, which he continued against Gayadin's widow and obtained a consent decree about one-third of the property. Ratan also brought a suit for partition, claiming his one-third, but he remained with Gayadin, and withdrew his claim. Later on, Ratan brought a suit against the widow, alleging that she was wasting the estate. Upon the death of Gayadin's widow in 1896 Umrao brought a suit claiming a share in Sherpur. The Judicial Commissioner held that Ratan Singh remained joint with Gayadin till the latter's death, and then became entitled to two-thirds of the property. The Privy Council agreed with this opinion. This case has been understood as an authority for the proposition that the withdrawal of a suit for partition negatives the discontinuance of the joint family. It ought to be borne in mind that Ratan Singh continued to live with Gayadin after the withdrawal of his suit.

In Madras there was a long course of decisions that partition could only result either by an agreement of the coparceners to separate, or by a preliminary decree in

(1) (1910) I.L.R., 32 All., 415.

a suit for partition. This view had to be departed from in I.L.R., 39 Mad., 136 and 159 (F.B.), after the clear pronouncement of the Privy Council in I.L.R., 35 All., 80 and in other cases. Then came the case of *Palaniammal v. Muthuvenkatachala Maniagar* (1), the facts of which were somewhat complicated. In 1835 a suit for partition was instituted by one of the younger sons. The pleadings of that suit, or even the terms of the decree passed in that suit, are not very clear from the report. In 1843 a second suit for partition was instituted, in which shares were claimed under a will of the first zamindar. The Civil Judge held that the will could not operate with reference to the joint family property, but he directed the partition on lines inconsistent with the Hindu law of inheritance. The parties subsequently effected a *razinama* or compromise in the Sudder Adalat on appeal, asking the court not to proceed with the partition. The court accepted the compromise and declared in the judgement that the family was to continue joint. In 1849 one of the plaintiffs sued the eldest son for partition and obtained a decree. Later on was instituted the suit for partition which gave rise to this appeal. The case turned principally upon the construction of Exhibit 1, which was an agreement between the senior coparcener and only one of the junior coparceners, and upon the inference permissible from the transactions of the family members between the years 1835 and 1855. Their Lordships held that the effect of these was not to cut off the junior coparcener from the joint family and did not let in the other coparceners who were not parties to Exhibit 1 or their descendants by rule of survivorship upon the failure of the senior coparcener's branch. WALLIS, C. J., observed as follows:—"Treating the matter as one of individual volition, it seems to me that

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(1) (1917) 38 M.L.J., 759.

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it is open to a coparcener who has filed a plaint for partition to abandon that intention before the suit has proceeded to a decree and to elect to continue in a state of jointness." KUMARASWAMI SASTRI, J., after setting out the facts, summarized the result in these words :—"It will thus be seen that by various agreements or transfers the first branch of the family continued to be in possession and enjoyment of the *zamin* without any actual partition being effected." As regards some of the other documents relied on, he held that they did not indicate an unequivocal intention to separate, but tended to show that an arrangement was reached as to the mode of enjoyment in such a way as to impress upon the property the character of impartibility. The learned Judge remarks :—"Assuming that the mere filing of a plaint is sufficient to sever the status of the coparceners, it seems to me that till a decree is passed in that suit it is open to the plaintiff to change his mind and to withdraw the suit so as to leave him in the same position as if no suit had been filed. I can find nothing either in Hindu law or in the decided cases to countenance the view that a mere expression of an intention to separate is irrevocable." His Lordship further observed :—"Where from the scope of the plaint or pleadings all that appeared is that one member of an undivided family wanted to cut himself off from the rest after receiving his share, and the other members neither asked nor evinced any desire for a partition *inter se*, the consideration of the shares of the others is only incidental for the purpose of giving the relief which the plaintiff wants (as it is not possible to arrive at the share of one coparcener without knowing how many coparceners there are and their shares), and the status of the others is unaffected by the decree in favour of one member."

If the institution of the suit for partition be an indication of an unequivocal intention to separate, the

moment the intention is expressed it must inevitably result in partition. The other members of the family have from that moment onwards become members of a divided family, holding their property as a separate tenure, with or without a division of their interest *inter se*. It cannot be questioned that in view of the decision of the Judicial Committee in I.L.R., 32 All., 415, and I.L.R., 48 Mad., 254, it must be held to be settled law that the intention to separate can very well be abandoned. But how can the abandonment of intention on the part of the plaintiff bring about the restoration of the *status quo*, independent of the volition of the other members of the family? Another question which arises is whether the intention could be abandoned only before a preliminary decree for partition has been passed by the trial court? Could it be abandoned at a later stage of the same suit? It is true that the effect of the preliminary decree is the ascertainment of the shares of the party or parties concerned in the joint family assets. Supposing there is an appeal from the preliminary decree and the suit is withdrawn during the pendency of the appeal, how will this withdrawal operate upon the status and character of the family and the property held by it? It has been held that in order to constitute a disruption of the family it is not necessary that the suit for partition should culminate in a preliminary decree for partition. The Privy Council has held that the effect will be a division of the family even where the suit has been wrongly dismissed.

The case in 33 M.L.J., 759 is not helpful to the defendants for the following reasons :—

(1) The evidence disclosed that the family had continued joint and had not intended or persisted in its intention to separate.

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(2) The transactions in support of partition were held not to indicate an unambiguous intention to separate.

(3) It was found that the real intention of the members of the family was not to divide the family property, but to create an impartible estate by agreement.

This case is, therefore, no authority for the proposition that where six different branches of the family, descended from a common ancestor, enter into an agreement to get the entire property partitioned fully and completely through some arbitrators, this does not effect a partition of the family either because the arbitrators did not enter upon their duty at all or because the property was not divided by metes and bounds for some unexplained cause.

The above case was followed in 57 Indian Cases, 800, 46 M.L.J., 404 and was affirmed on appeal by the Privy Council in I.L.R., 48 Mad., 254.

It was held in the last-mentioned case that the coparceners in a joint family can by agreement separate among themselves, but the separation of one member does not necessarily result in the separation of the other members of the family, and that "the remaining coparceners, without any special agreement among themselves, may continue to be coparceners and to enjoy as members of a joint family what remained after such a partition of the family property. That the remaining coparceners continued to be joint, may, if disputed, be inferred from the way in which their family business was carried on after their previous coparceners had separated from them." Their Lordships further held that if a member of a joint family withdrew his suit for partition, it may result, as was held in *Kedar Nath's* case (1), that no

(1) (1910) I.L.R., 32 All., 415.

severance of the joint status resulted. "Their Lordships see no reason to depart from that view, although such a plaint, even if withdrawn, would, unless explained, afford evidence that an intention to separate had been entertained. . . . In a suit for partition which proceeds to a decree which was made, the decree for partition is the evidence to show whether the separation was only a separation of the plaintiff from his coparceners, or was a separation of all the members of the family from each other."

There can be no doubt that, if an agreement for partition of the property by reference to arbitration destroys the status of the joint family, it produces in law much the same result as a preliminary decree for partition. This will be the logical result of the agreement. Shares may be ascertained by a preliminary decree as much as by an agreement of the parties.

Where an *ekrarnama* entered into between the members of a Hindu undivided family clearly and unequivocally declared that defined shares had been allotted to the various coparceners in the entire property, this effected a partition of the estate, and its legal effect and construction could not be controlled or altered by evidence of the subsequent conduct of the parties—see *Balkishen Das v. Ram Narain Sahu* (1), and *Jai Narain Rai v. Baijnath Rai* (2). In the last-mentioned case reliance was placed upon a sale-deed dated the 21st of May, 1919, to prove that in spite of the document, dated the 12th of April, 1919, all the three branches of the family purchased the property without any definement of the shares, and upon the fact that the Subordinate Judge had found that there was no sufficient evidence to prove that the division of movables had ever taken place. The Court held that these facts did not affect or control the result of the agreement, dated the 12th of April,

(1) (1903) I.L.R., 30 Cal., 738 (2) (1923) I.L.R., 50 All., 615.  
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1919, which was construed to have effected a partition in law.

The result of the decisions may be conveniently summarized as follows:—

(a) Partition is the severance of the status of a joint family, which may be effected by the exercise of individual volition indicating an intention to separate from the other members of the family.

(b) The said intention must be manifested clearly and unambiguously.

(c) The intention to separate may be established either by explicit declaration or from an uniform and consistent course of conduct of the party concerned or of other members of the family. The intention may be declared orally or in writing, and may manifest itself from the filing of a plaint for partition, from an application for mutation of names to the Tahsildar in specific shares with a view to separate enjoyment, from a written notice served upon the members of the family demanding a partition of the property, from an agreement executed by the various members of the family whereby the shares of the individual members are defined with the object of securing separate enjoyment of the profits, or from an agreement of reference to arbitration for the partition of the property. Instances like these may be enumerated but cannot be exhausted.

(d) It is not necessary that there should be a consensus or agreement among the coparceners for the severance of status of a joint family.

(e) Where severance is effected by explicit declaration, the result is decisive, and the legal result cannot be affected or controlled by the subsequent conduct of the parties.

(f) In the absence of an explicit declaration, an inference in support of the intention may be drawn from evidence of conduct which will necessarily be different according to the varying postures of each case.

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(g) Where there is evidence of intention to separate, this can only be annulled by clear evidence of the renunciation of such intention, and, in some cases, by consensus or agreement on the part of the members of the family to re-unite.

(h) Partition may also result from a definement or ascertainment of shares with a view to separate enjoyment of property.

(i) The separation of one member of a coparcenary is not necessarily a separation of the other members *inter se*.

The document dated the 30th of September, 1907, does not lend itself to the construction that the executors did not intend to separate unless a complete partition was effected of the entire property into six parts. A like construction was sought to be placed upon the *ekrarnama* referred to in I.L.R., 50 Calc., 84, the provisions of which were not dissimilar to the agreement of reference in this suit (see page 89. But the Judicial Committee did not accept this construction.

The division of the property is the consequence of the intention to separate, and the separate enjoyment of the property was evidently the result aimed at. As already noticed, the intention to separate was expressed in the document in unmistakable terms. Its legal effect was to produce a disruption of the family.

[The rest of the judgement was mainly concerned with the discussion of the defendants' evidence in support of their position that either there had been a relinquishment of the intention to separate as evidenced by the reference to arbitration of the 30th of September,

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1907, or else a re-union of the family. The judgement then concluded :—]

The agreement dated the 30th of September, 1907, has the effect of creating a partition of the joint family. The defendants' direct evidence relating to the renunciation of that intention and of a formal re-union of the several members of the family has been rejected as utterly unworthy of credit. The other documents produced by the defendants are inconclusive. They do not prove jointness or re-union, and are not inconsistent with the business of the family being carried from 1907 onwards on the basis of a partnership amongst the members of the family who held as tenants in common. The failure of Hira Lal, Khamman Lal and Jhanjhan Rai to offer themselves as witnesses in this case, the non-production of account books, and the non-production of Chhote Lal, one of the surviving arbitrators, as a witness, are matters which cannot be lightly disregarded. They raise presumptions against the defendants.

We would allow the appeal and grant the plaintiffs a declaratory decree for the property claimed, except such items of property as have been acquired by the defendants after the 10th of April, 1915. The plaintiffs will receive their costs throughout.

*Appeal allowed.*

*Before Mr. Justice Banerji and Mr. Justice Weir.*

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MUHAMMAD SHAFIQ AHMAD (PLAINTIFF) v. MUHAMMAD MUJTABA AND ANOTHER (DEFENDANTS).\*

*Muhammadan law—Waqf—Waqf-al-ul-aulad—Private or public trust—Civil Procedure Code, section 92.*

A "waqf-al-ul-aulad" in Muhammadan law is not, generally speaking, a public trust of the kind to which section 92 of the Civil Procedure Code applies, and the fact that

\*First Appeal No. 352 of 1925, from a decree of Vishnu Ram Mehta, Additional Judge of the Court of Small Causes, exercising the powers of First Subordinate Judge of Cawnpore, dated the 31st of March, 1925.

a very small portion of the income of the *waqf* property may be assigned to purposes of a charitable nature will not make it so.

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*Mahomed Ismail Ariff v. Ahmed Moola Dawood* (1), *Williams v. Kershaw* (2), *Attorney-General for New Zealand v. Brown* (3), *Mahomed Ahsanulla Chowdhry v. Amarchand Kundu* (4), *Mujib-un-nissa v. Abdur Rahim* (5), *Muhammad Munawar Ali v. Razia Bibi* (6), *Sajedur Raja Chowdhuri v. Gour Mohun Das Baishnav* (7), *Muhammad Ibrahim Khan v. Ahmad Said Khan* (8), *Muhammad Abdul Majid Khan v. Ahmad Said Khan* (9), *Puttu Lal v. Daya Nand* (10) and *Abdur Rdhim v. Mahomed Barkat Ali* (11), referred to.

THE facts of this case are fully stated in the judgment of WEIR, J.

Maulvi Iqbal Ahmad and Maulvi Muhammad Abdul Aziz, for the appellant.

Dr. Kailas Nath Katju and Maulvi Mushtaq Ahmad, for the respondents.

WEIR, J :—This appeal arises out of a suit for the following reliefs. First, a declaration that the right of the first defendant to remain *mutwalli* of certain *waqf* property has become extinct, and that the plaintiff is entitled to possession of the *waqf* property as *mutwalli*, and that he may be put in possession of it as such. Secondly, a declaration that a sale-deed of the 5th of October, 1920, by which the first defendant transferred a certain portion of the *waqf* property to the second defendant is void, and that the second defendant may be ejected from that property and the plaintiff put in possession of it as *mutwalli*. The plaintiff is the eldest son of the first defendant, and the *waqf* in question was

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| (1) (1916) I.L.R., 43 Calc., 1085.     | (2) (1835) 55 Cl. and F., 111.    |
| (3) (1917) A.C., 393.                  | (4) (1889) I.L.R., 17 Calc., 498. |
| (5) (1900) I.L.R., 23 All., 233 (242). | (6) (1905) I.L.R., 27 All., 320.  |
| (7) (1897) I.L.R., 24 Calc., 418.      | (8) (1910) I.L.R., 32 All., 503.  |
| (9) (1913) I.L.R., 35 All., 459.       | (10) (1922) I.L.R., 44 All., 721. |
| (11) (1927) I.L.R., 55 Calc., 519.     |                                   |

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created by the father of the first defendant by a deed, dated the 13th of September, 1919. The deed declares that the *waqif* makes "a *waqf* for self and children" in respect of his immovable property specified at the foot of the deed, and that the property "shall henceforward be property dedicated to God." The deed contains the following provisions:—That the *waqif* should remain *mutwalli* to the end of his life; that on his death his son Muhammad Mujtaba (first defendant) should be sole *mutwalli* and, after him, his son, Muhammad Shafiq Ahmad (the plaintiff) should be *mutwalli*; that the office of *mutwalli* should be hereditary in the family of the *waqif*: that after the death of the *waqif*, it should be the duty of the *mutwalli* to maintain the *waqf* property in repair, and to pay taxes and to expend at least 6 pies per rupee of the residue of the income on "good deeds and charity." The balance of the income, so far as the plaintiff and the first defendant are concerned, is to be divided as follows:—2 *suls* share to the first defendant and 1 *suls* share to the plaintiff. The deed further provides that inasmuch as a portion of the *waqf* property, namely an *ahata*, (which I shall henceforth call the *ahata*), had been mortgaged by the *waqif* before he created the *waqf*; and inasmuch as the *waqif* was also under an obligation to build upper stories on certain shops which are also included in the *waqf*, it should be the duty of the *mutwalli* to pay off the mortgage debt and to build the upper stories of the shops "out of the rent of the *ahata*" or "by raising money against the said *ahata* in any other reasonable and proper manner." (This *ahata* is the property which the first defendant subsequently sold to the second defendant and which the plaintiff now seeks to recover.) The deed finally provides that if any of the *mutwallis* "fails to abide by the dictates of Islam or does anything against the condition of the *waqf*nama he shall be deprived of the right of

being *mutwalli*, and after him whoever may be surviving and entitled according to the conditions of the *waqf-nama* shall be *mutwalli*"; but if none of the male or female descendants of the *waqif* survives, "the District Judge shall have power to appoint any reliable Musalman of the Sunni sect and belonging to the Hanafi school as *mutwalli*"; and that such *mutwalli* should spend the income from the *waqf* property on the religious education of Musalmans, submit an account of income and expenditure to the District Judge every year, and comply with his orders regarding management of the property.

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The present suit was brought as an ordinary suit before the first Subordinate Judge of Cawnpore, who, holding that it should have been brought under section 92 of the Civil Procedure Code, granted a decree declaring that the properties mentioned in the plaint were *waqf* property and refused to give the plaintiff any other relief. The plaintiff has appealed against so much of this order as refuses him the relief for which he asks, and the defendants have appealed on the ground that no declaration should have been given to the plaintiff.

The first point to be decided is whether section 92 of the Civil Procedure Code applies to this suit or not. Counsel for the defendants divided his argument on this point into two heads; first, that under Muhammadan law every *waqf-ul-aulad* is an express trust for a charitable purpose of a public nature, so that, even if the whole of the income of the *waqf* be devoted to the support of the *waqif's* family, the *waqf* is, by reason of the ultimate remainder to charitable purposes, a public *waqf*. Secondly, that even if this is not so, the obligation to expend 6 pies per rupee of the net income of the property on good deeds and charity makes this *waqf* a public *waqf*.

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As to the first point, in *Mahomed Ismail Ariff v. Ahmed Moolla Dawood* (1), their Lordships of the Privy Council make the following observations :—"The Musalman law, like the English law, draws a wide distinction between public and private trusts. Generally speaking, in case of a *waqf* or trust created for specific individuals or a determinate body of individuals, the Qazi, whose place in the British Indian system is taken by the civil court, has in carrying the trust into execution to give effect as far as possible to the expressed wishes of the founder. With respect, however, to public religious or charitable trusts, of which a public mosque is a common and well-known example, the Qazi's discretion is very wide." In view of this authoritative expression of the law on the subject, I think it is not open to this Court to hold that there can be no such thing as a private *waqf* in Muhammadan law; but even if we had not the opinion of their Lordships to guide us, I should, though with less confidence, be inclined to agree with the argument of counsel for the plaintiff that in construing section 92 of the Civil Procedure Code the words, "public trust of a charitable or religious nature", should be given their ordinary meaning, and cannot be made to vary according to the classification of trusts which may be adopted in different systems of law. The section does not affect substantive rights except in so far as it prescribes the manner in which they can be enforced. If the provision for expending six pies per rupee on good deeds and charity be ignored, the *waqf* with which we are concerned constitutes a trust for the benefit of the family of the *mutwalli* so long as any member of that family survives, and that trust is, in my opinion, a private trust even though the ultimate trust is for a charitable purpose. The situation appears to me to be similar to that which would arise if property were vested

(1) (1916) I.L.R., 43 Cal., 1085 (1100).

in a trustee upon trust for some named individual for his life and after his death upon trust for a named public charity. Such a trust, so far as the individual tenant for life would be concerned, would be a purely private trust, in enforcing which he would be entitled to proceed in the ordinary way; although, if the trustee were wasting the *corpus* of the trust funds, the Advocate-General (i.e., in these Provinces, the Legal Remembrancer), or two members of the public with his consent in writing, might institute a suit under section 92 of the Code of Civil Procedure for the purpose of preserving the *corpus* of the trust funds. I now turn to the second argument put forward on behalf of the defendants, namely that the direction to spend a 1/32 part of the income of the property on "good deeds and charity" makes the *waqf* a public trust within the meaning of section 92 of the Civil Procedure Code. The exact provisions of the *waqfnama* concerning charity are these:—There is no dedication of any defined portion of the income of the property to any benevolent or charitable purpose during the life of the *waqif*. He merely announces his intention "to spend such amount as he may think proper in the name of God." After the death of the *waqif* it becomes the duty of the *mutwalli* to spend "according as he thinks proper, at least 6 pies per rupee of the net income on good deeds and charity", and it is finally provided that "no outsider shall be entitled to benefit himself" in the life-time of the *waqif* or in the life-time of Muhammad Mujtaba and his sons, as well as of his wife Musammât Mariyam Bibi, "with the exception of the fact that the *mutwalli* may render help to any needy person by way of charity out of the aforesaid amount", that is, the 1-32nd part of the net income of the *waqf* property. The first comment which I wish to make on these provisions is that the amount to be spent in accordance with them is exceedingly small. The income of the property at the

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date of the *waqfnama* was about Rs. 180 per month, from which Rs. 70 per mensem would have to be deducted for interest at 1 per cent. per mensem on a mortgage for Rs. 7,000 on the *ahata*, so that the sum which ought to be spent would be about Rs. 3-8-0 per month. The objects on which this small sum is to be spent are stated so vaguely, and the discretion allowed to the *mutwalli* is consequently so wide, that I greatly doubt whether there is any effectual dedication of any portion of the income to charity. All good deeds are not necessarily charitable in the legal sense. Thus, for instance, in *Williams v. Kershaw* (1), Lord COTTENHAM held that a gift "to benevolent, charitable and religious purposes" was void, and this decision was quoted and applied by their Lordships of the Privy Council in *Attorney-General for New Zealand v. Brown* (2), where the legacy was for "such charitable, benevolent, religious and educational institutions, societies and objects" as the trustees of the will should select. It might, however, be said that in this case the words "good deeds" are merely used as a synonym for charitable almsgiving, and that, therefore, the fraction of the income with which I am dealing is to be devoted to the relief of poverty. But, even if this were so, the powers which are given to the *mutwalli* in spending this small sum are so extensive as to "when" and "how" and "where" it is to be disbursed, that it would be impossible effectually to enforce this trust (if there be a trust) without settling a scheme for the application of the money; and it seems to me that this is a thing that the *waqif* never contemplated. In my opinion, taking the deed as a whole, it amounts to this:—That the *waqif* wished to impose a religious or moral duty upon the *mutwalli* to spend a  $\frac{1}{32}$  part of the income on almsgiving in such a way as would be becoming to a pious Muhammadan in the position of the

(1) (1835) 5 Cl. and F., 111.

(2) (1917) A.C., 393.

*waqif*, but that he just stopped short of imposing a legal duty to do so; because the provisions of the *waqfnama* show that it was the intention of the *waqif* that as long as any member of the *waqif's* family was living the *mutwalli* should not be obliged to render accounts to any public authority. The fixing of a minimum amount for purposes of almsgiving appears to me to have been inserted in order to prevent quarrels among the members of the *waqif's* family concerning the amount which the *mutwalli* might properly spend on charity if he chose to do so. But even if I am wrong in this, and if the deed be taken as imposing a charge on the property to the extent of 1/32 part of the income for charitable purposes, I do not think that this would have the effect of making the *waqf* a trust for a public purpose of a charitable nature within the meaning of section 92 of the Civil Procedure Code. In the absence of any express authority on this question—and none such has been cited in argument—I think that I am entitled to rely on the analogy of certain cases which came before their Lordships of the Privy Council before the Waqf Validating Act was passed, and in which the question was whether the dedication of a part of the income of *waqf* property to charity was or was not sufficient to support a valid *waqf* of the whole, where the bulk of the property was devoted to the maintenance of the *waqif's* family in perpetuity, with an ultimate remainder to charity if the family died out. In *Mañomed Ahsanulla Chowdhry v. Amarchand Kundu* (1), their Lordships, when discussing the effect of the *waqfnama* in that case, said :—“Their Lordships cannot find that the deed imposes any obligation on the grantor's male issue, or on any other person into whose hands the property may come, to apply it to charitable uses except to the extent to which he (the *waqif*) had himself been accustomed to perform them .

(1) (1889) I.L.R., 17 Cal., 498.

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. . . . For all that appears, there is no reason to suppose that the charitable uses would absorb more than a devout and wealthy Muhammadan gentleman might find it desirable to spend in that way." Again in *Mujib-un-nissa v. Abdur Rahim* (1), their Lordships observed that a *waqf* will be valid "if the effect of the deed is to give the property in substance to charitable uses. It will not be so if the effect is to give the property in substance to the testator's family"; and in *Muhammad Munawar Ali v. Razia Bibi* (2), it was held that where a provision for charity created a mere charge of an inconsiderable amount on the profits of the estate there was no valid *waqf*. It is true that in these three cases their Lordships were considering a question which has now been finally settled by the Waqf Validating Act, namely, whether a *waqf* for the benefit of the *waqif's* family was or was not void if it created a perpetuity. But, as I have said, I think that I am entitled to take them as a guide in determining whether the *waqf* before us is or is not a public trust. The conditions of this *waqf* almost exactly fit the tests which were applied by their Lordships in the three cases which I have cited to determine the question whether there was a charitable trust or whether the *waqf* was a private trust. In the present case there was no obligation on the *waqif* himself to spend any particular sum on charity. The amount to be spent by his successors is very small, both absolutely and relatively to the total amount of the income of the *waqf*, and the discretion given to the *mutwalli* in spending it is as wide as can possibly be; so that, as I have said, it would be practically impossible to control him in dispensing it. There is also the fact that, as has been proved in evidence, the *waqif* was in the habit of dispensing alms himself, and that, if I am right in the interpretation which I put upon the *waqfnama*, he

(1) (1900) I.L.R., 23 All., 233 (242). (2) (1905) I.L.R., 27 All., 320.

merely wished to provide for the continuance of this practice in his family as a moral or religious duty which he considered becoming to a man of his religion. I, therefore, hold that the deed before us does not create a public *waqf*, and consequently it is unnecessary for me to discuss the effect of a line of decisions which were cited in argument, beginning with *Sajedur Raja Chowdhuri v. Gour Mohun Das Baishnav* (1). These decisions all deal with a distinction between cases in which the public may sue to enforce a public trust and cases in which a private party may sue to enforce his own rights under such a trust, and with the effect of section 539 of the old Civil Procedure Code, or of section 92 of the present Code, upon such suits. This distinction was recognized by Benches of this Court in *Muhammad Ibrahim Khan v. Ahmad Said Khan* (2), *Muhammad Abdul Majid Khan v. Ahmad Said Khan* (3) and in *Puttu Lal v. Daya Nand* (4), in which latter case it was held that section 92 of the Code of Civil Procedure did not apply to a case where a plaintiff claimed a declaration of his right to act as a trustee of a temple under a deed of endowment in preference to the defendant who claimed a similar right. In the case before us the plaintiff admits that he is claiming to be appointed *mutwalli* in order to make certain of getting his 1/3rd share of the income of the *waqf* property, which, he says, has been wrongfully withheld from him by the first defendant, and that he wants to recover the property which has been sold; so that it might be argued on the analogy of the case to which I have just referred that, even if the *waqf* is a public *waqf*, the plaintiff is seeking only to enforce his private rights under it. But in view of certain observations of their Lordships of the Privy Council in *Abdur Rahim v. Mahomed Barkat Ali* (5), I am not certain how far this

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(1) (1897) I.L.R., 24 Calc., 418.

(2) (1910) I.L.R., 32 All., 503.

(3) (1913) I.L.R., 35 All., 459.

(4) (1922) I.L.R., 44 All., 721.

(5) (1927) I.L.R., 55 Calc., 519.

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distinction between the enforcement of public and private rights can now be maintained where the relief sought is of one of the kinds enumerated in section 92 of the Civil Procedure Code. I, therefore, prefer to base my judgment on the ground that the *waqf* with which we are concerned does not constitute a public trust.

[His Lordship then discussed the case on the merits and was for dismissing the appeal with regard to these also.]

BANERJI, J. :—I concur.

By THE COURT.—The order of the Court is that the plaintiff's appeal is dismissed with costs.

*Appeal dismissed.*

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*Before Mr. Justice Kendall and Mr. Justice Niamat-ullah.*

MUSHARRAF BEGAM AND OTHERS (DEFENDANTS) v.  
 SIKANDAR JAHAN BEGAM (PLAINTIFF).\*

*Muhammadian law—Waqf—Shias—Waqf-alul-aulad—"Family" of waqif—Daughter-in-law—Act No. VI of 1913 (Musalman Waqf Validating Act), section 3—Act (Local) No. 1 of 1903 (Bundelkhand Encumbered Estates Act), section 10.*

*Held on a construction of a deed of waqf executed by a Shia Muhammadan mainly for the benefit of his son and daughter-in-law :—*

(1) that the daughter-in-law would be included in the term "family" as used in section 3(a) of the Musalman Waqf Validating Act, 1913;

(2) that the fact that part of the endowed property was subject to a mortgage and part was subject to a charge imposed under the provisions of the Bundelkhand Encumbered Estates Act, 1903, and the deed directed these incumbrances

\*First Appeal No. 350 of 1925, from a decree of Saiyid Muhammad Saiduddin, Additional Subordinate Judge of Allahabad, dated the 29th of September, 1925.

to be discharged, did not affect the validity of the *waqf*. *Hamid Ali v. Mujawar Husain Khan* (1), referred to :

(3) that part of the endowed property, being within an area to which the Bundelkhand Encumbered Estates Act, 1903, applied, and having been made the subject of a settlement for the liquidation of debts under the Act, could not be made *waqf*, having regard to section 10(2) (a). The word "give" as used in that section is not confined to the restricted sense in which it is used in the Transfer of Property Act, 1882, but would include the dedication of property by way of *waqf*. *Sadik Husain Khan v. Hashim Ali Khan* (2), referred to.

THE facts of this case are fully stated in the judgement of the Court.

Mr. B. E. O'Connor, Sir Tej Bahadur Sapru, Pandit Uma Shankar Bajpai, Maulvi Iqbal Ahmad, Mr. S. C. Goyle, Maulvi Majid Ali and Mr. Muhammad Ahmadul Haq Ansari, for the appellants.

Dr. Kailas Nath Katju, Maulvi Mushtaq Ahmad and Maulvi Haidar Mehdi, for the respondent.

KENDALL and NIAMAT-ULLAH, JJ.:—This is an appeal from a judgement of the Additional Subordinate Judge of Allahabad, giving the plaintiff respondent a decree for a declaration that certain properties named in the plaint are *waqf* properties, and for possession thereof as *mutwalli*, and a sum of nearly Rs. 2,000 mesne profits which had been realized by some of the defendants from the property during the period of their possession and that of the receiver. The property concerned was owned by one Arab Ali Khan, a resident of Allahabad city. It is mostly zamindari property in the three parganas of Arail, Sikandra and Chail, a consideration the importance of which will become clear later on. There is also some land occupied by the houses of tenants or lying waste in the city of Allahabad. The plaintiff respondent, Musammat Sikandar Jahan Begam, is the

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(1) (1902) I.L.R., 24 All., 257.

(2) (1916) I.L.R., 38 All., 627.

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daughter-in-law of Arab Ali Khan, and she claimed possession as *mutwalli* under the terms of a deed of *waqf* said to have been executed by Arab Ali Khan on the 14th of April, 1919. The first three defendants are one of the widows and the two surviving daughters of Arab Ali Khan, and the fourth defendant is Khan Sahib Mahmud Ali Khan, to whom a small portion of the *waqf* property had been transferred before the institution of the suit.

[A portion of the judgement, not material for the purpose of this report, is here omitted.]

In the deed, after setting forth that a part of the property is pledged and hypothecated to the creditors in security of debts, he states that he wishes to make a *waqf* of the entire property described, "in favour of my male issues and their male issues under the provisions of Act VI of 1913." The legal formula is referred to, and the *mutwallis* are named in order, viz :—

(1) My son Haidar Husain Khan.

(2) His eldest son by his wife Sikandar Jahan Begam (the plaintiff) or the ablest of the several sons, or *if perchance Haidar Husain has no son by Sikandar Begam and he dies childless in my presence or if he, for any reason, resigns his office as a mutawalli, I shall manage the waqf property as a mutwalli, but I shall not be benefited by the income of the waqf property.*

(3) After me or after Haidar Husain Khan, Musammât Sikandar Begam.

(4) The son of Haidar Husain, if any, by his second wife.

(5) After the son of Haidar Husain Khan, his eldest son, etc.

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Finally, if none of Haidar Husain's line be available, a managing committee is to be appointed as described in the deed to spend the income on the religious and charitable purposes named in paragraph No. 4.

There is then a description of certain debts which have to be paid, viz. :—

(a) Rs. 2,900 a year is to be paid along with the Government revenue in accordance with the provisions of the "Bundelkhand Act."

(b) Rs. 40,000, in security of which the property is pledged and hypothecated, and in lieu of the interest on which profits are paid to the mortgagee.

There is a direction that after the Government debt has been paid "the annual amount . . . . . shall be paid to my creditors towards the payment of their principal amount so long as the entire debt is not paid up." Then follow directions that the *mutwalli* shall pay monthly allowances to the two widows, viz., Rs. 15 to Musammat Musharraf Begam (the defendant) and Rs. 25 to Musammat Imtiazan, with a further allowance of Rs. 30 a year for clothes to the former. After the payment of these debts and allowances the balance of the profits is to be realized by the *mutwalli* for his expenses and the maintenance of his children, except in the event of Arab Ali Khan himself being *mutwalli*. It is to be observed that not only is a reference made to the legal formula which is to be recited and to the Act validating *waqfs* of this nature, but Arab Ali Khan, with the apparent intention of conforming with the law relating to *waqfs* executed by Shias, is careful to provide that he shall not himself be permitted, when acting as *mutwalli*, to use the profits to meet his own expenses.

[A portion of the judgement is here omitted.]

The defendants appellants, as has been remarked above, suggested that the deed of *waqf* had never been



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executed. But, apart from this, they contend that even if it was formally signed it was a fictitious deed, that is to say that Arab Ali Khan never really intended to create a *waqf*, and also that the deed had never been acted upon and that possession had never been given to Haidar Husain. Other legal objections to the deed have been urged.

[On the merits it was found that the *waqfnama* was duly executed and that it was not fictitious document. The judgement then continued :—]

It has been next contended that the plaintiff respondent, not being a member of the settlor's family, no provision could be validly made in her favour under the Musalman Waqf Validating Act of 1913. Section 3 of that Act lays down :—

"It shall be lawful for any person professing the Musalman faith to create a *waqf* which in all other respects is in accordance with the provisions of Musalman law, for the following, among other, purposes :—

(a) for the maintenance and support wholly or partially of his family, children or descendants, and

(b) where the person creating a *waqf* is a Hanafi Musalman, also for his own maintenance and support during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated :

Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognized by the Musalman law as a religious, pious or charitable purpose of a permanent character."

The circumstances which led to this enactment are well known. Their Lordships of the Judicial Committee had held in a series of cases that a *waqf* in favour of the settlor's family, children and descendants, generation after generation, and ultimately in favour of the

poor when the settlor's family becomes extinct is invalid, as the main object in such cases was to create a perpetuity for the benefit of his own family, the charitable object being too remote and illusory, and that unless real and substantial provisions be made for charitable objects the *waqf* cannot be upheld—see, for example, *Abul Fata Mahomed v. Rasamaya Dhur* (1). It was represented by the Indian Muslim community that the law thus laid down was a departure from Muhammadan law, which regarded a provision for one's family and children as an act of charity. Mr. Ameer Ali exhaustively dealt with the subject in *Bikani Mia v. Shuk Lal Poddar* (2), and referred to a large number of original texts and earlier cases decided by British courts upholding the validity of such dispositions. Accordingly, the bill, which subsequently became the Waqf Validating Act, was allowed to be introduced in the Imperial Legislative Council (as it was then designated) by a non-official Muslim member. Section 3 (a) with its proviso and section 4 of the Act declare that such *waqfs*, i.e., those in favour of the settlor's family, children and descendants, with ultimate benefit to the poor or other charitable objects, shall be deemed to be valid and that the remoteness of the contingency in which the benefit is to accrue to the poor or other charitable purposes shall not affect the validity thereof. Section 3(b) is confined to Hanafi Muhammadans, because there was a difference of opinion between two of their doctors, one of whom, Imam Muhammad, maintained that the settlor could not reserve any benefit to himself, while, according to the other, Imam Abu Yusuf, such a provision ranked with that in favour of his family, children, and descendants and could be validly made. The Shia authorities were unanimously in favour of the former view and consequently no special legislation on that point was necessary in

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(1) (1894) I.L.R., 22 Calc., 619.

(2) (1892) I.L.R., 20 Calc., 116.

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case of Shia Muhammadans. Among the Sunnis, on the other hand, the generally accepted view was the latter, and therefore section 3(b) was enacted to remove the element of uncertainty due to the difference of opinion above indicated.

The effect of the Waqf Validating Act on the Muhammadan law is that a provision in favour of the settlor's "family, children and descendants" with ultimate benefit reserved for the poor or for any other religious or charitable purpose is valid, though, but for the enactment, it would have been otherwise in view of the pronouncement of their Lordships of the Privy Council. In the case before us it is necessary to have recourse to the Act only if the word "family" be held to include a son's widow, because in that case, but for the Act, the *waqf* would be questionable on the view taken by the highest tribunal. Therefore, if she is one of the family, the Act applies and the validity of the *waqf* is declared thereby; if she is not, then she cannot and need not avail herself of that Act, but must found her case on the Muhammadan law pure and simple, and the appellants must refer to some rule of that law which makes the *waqf* invalid for conferring a beneficial interest for life on the son's widow. We have not been referred to any authority in support of the appellants' contention. On the contrary, Muhammadan law clearly allows provisions similar to life interests or other limited interests to be made in a *waqf*; see Baillie, volume 1, pages 570—584, quoted by Tyabji in section 473, p. 571, 2nd edition, which relates to Sunnis. The Shia law is the same, with this difference only, that where a series of life interests are created, the person taking in the first instance should be one in being and competent to take beneficially at the time when the *waqf* is made (Tyabji's Muhammadan Law, section 485, pages 602-603, 2nd edition, both of which conditions are fulfilled in the case

before us. It would be a very unsatisfactory state of law if a provision like the one in question invalidates the *waqf*. The plaintiff is to take a beneficial interest for life in the *waqf* property after her husband's death, only if she has no son of her own, who would, if there be one, take precedence over her. Sons born of any other wife of her husband are postponed till after her death. But for a provision of this kind it was felt that she would have to depend for her maintenance on the bounty of her stepson. We think that the word "family" has been used in the decision of their Lordships of the Privy Council and in the Waqf Validating Act in its broad popular sense so as to include all relatives more or less dependent on the settlor. A daughter-in-law living with an Indian householder is undoubtedly a member of his family in that sense. The point is, however, only of academic interest, because, as shown already, her position is not worse if she be not regarded as a member of the family. In this view of the matter we hold that this ground of attack on the validity of the *waqf* fails.

Another ground on which the validity of the *waqf* is impugned is that the settlor has reserved benefits under it for himself in so far as he has directed the payment of certain debts. Reference to these debts and directions with respect to them has already been made in an earlier part of the judgement, where relevant passages have been extracted from the official translation of the deed of *waqf*. In the preamble of the deed we have the following :—"The said property is owned and possessed by me as a proprietor without the partnership of any one else and no one has a claim in respect thereof, with the exception of this, that a portion of the property is pledged and hypothecated to the creditors in security of debts, and I have all powers of making transfers of and exercising proprietary rights in respect of the said property." It is to be noticed that the debts mentioned

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in the deed are of two kinds: *Firstly*, a large sum of money was due to the Government, who had paid up the debts of Arab Ali Khan under the Bundelkhand Encumbered Estates Act, I of 1903, and to whom it was repayable by easy instalments at a concessional rate of interest. The amount of yearly instalment was Rs. 2,900, recoverable as if it were Government revenue. (See section 26, Bundelkhand Encumbered Estates Act, I of 1903). With the Government revenue it was a charge on the property, taking precedence over any other incumbrances. (See sections 141, 142 and 146, United Provinces Land Revenue Act, III of 1901). The property situate within the area to which the Act applied could be sold in case of default. Clause (1) of the deed declares that this sum is "paid along with the Government revenue." It proceeds to direct "therefore" that it should be paid. *Secondly*, a sum of Rs. 40,000 was due to various creditors who held lands under possessory mortgage deeds and recovered interest from the usufruct thereof. There can be no doubt as to this class of debts being an incumbrance on the property. The opening lines of the deed clearly indicate that part of the property made *waqf* was encumbered property, and as such the *mutwalli*, as representing the *waqif*, must discharge the debt if the property is to be recovered from the mortgagees for the benefit of the *waqf*. As regards the first-mentioned liability the direction in the deed to pay future instalments recoverable as Government revenue is no more a direction to pay the settlor's debt than a direction to pay the Government revenue itself. We think it cannot be reasonably contended that a direction in a deed of *waqf* for payment of Government revenue as it falls due is a direction to pay the settlor's debt, making the *waqf* invalid. Nor is a direction to discharge certain incumbrances, subject to which the property has been made *waqf*, a direction to pay the settlor's debt. It is in the

nature of a direction for due administration of *waqf* properties. If the deed had made no reference to these debts, the *waqf* property would nevertheless have been liable therefor and the *mutwalli* for the time being would be responsible for payment.

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The rule of Shia law on the subject is thus stated by Sir R. K. Wilson :—"Section 484.—It is essential to the validity of a Shia *waqf* that the founder should divest himself not only of full ownership, but of everything in the nature of usufruct; and, therefore, where by the terms of the endowment a portion of the income is reserved to the endower himself during his life, not only is the actual clause of reservation void, but all that part of the deed which relates to the subsequent devolution of the reserved income is also void; but so much of the deed as relates to property devoted from the first to purposes unconnected with the personal benefit of the endower may nevertheless be valid."

"*Explanation I.*—If the endower (*waqif*) happens to be included in some general class of beneficiaries described in the deed of endowment, he will not be debarred from claiming in that capacity."

"*Explanation II.*—There is no objection (any more than in Hanafi law) to an endower constituting himself trustee (*mutwalli*) of his own endowment and allotting to himself for his services in that capacity the same remuneration that he assigns to his successors." (Wilson's Digest of Anglo-Muhammadan Law, section 484, pages 480-481, 4th edition).

One of the Hanafi law-givers who is of the same opinion has tersely expressed the rule that the settlor should not "eat out of" the *waqf* property. It is only a corollary from this general rule that some text-book writers have stated that "if the *waqf* were made in favour of another with a condition for the payment of

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the *waqif's* (appropriator's) debts and current expenses, it would not be valid" (e.g., Shama Charan Sarkar's Tagore Law Lectures 1874, page 473). The principle underlying the rule obviously is that, having made *waqf* of his property, the settlor should not participate in the enjoyment of the property. Where debts are charged on the property made *waqf* and must therefore be paid out of it, there is no benefit reserved for the settlor in the direction to pay such debts. Payment of such debts by the *waqf* is a discharge of its own obligation. The case will be otherwise if the settlor makes it a condition that his personal debts for which the *waqf* property cannot be made liable should be paid, for, in such a case the *waqf* funds are to be spent on him and would not be so spent but for the condition. Such was apparently the character of the debts referred to in *Hamid Ali v. Mujawar Husain Khan* (1). In view of these considerations we hold that this line of attack on the validity of the *waqf* also cannot succeed.

The third contention against the validity of the *waqf* is more serious and refers to section 10 (2), Bundelkhand Encumbered Estates Act, I of 1903, which is designed to afford facility to proprietors of land in certain areas for liquidation of their debts. It is not disputed that a part of the *waqf* property, detailed in the deed at pages 95 and 96 and reproduced in the plaint at pages 2—4, mentioned as situate in pargana Arail, lies within the area to which the Act applies. The procedure prescribed by the Act is that the Local Government should appoint a Special Judge (section 4) to whom applications made by indebted proprietors stating the particulars of their debts and property are to be forwarded, for inquiry and report, by the Commissioner who is to receive such applications in the first instance (sections 6 and 7). The Special Judge should "publish in the Gazette a notice in

(1) (1902) I.L.R., 24 All., 257 (263).

the vernacular language of the district calling upon all persons having claims against the person or the property of the proprietor . . . . to present to the Special Judge, within two months from the date of the publication, a written statement of their claims" (section 9). The Special Judge is to inquire into the history of dealings between the parties (section 13), and has wide powers to reduce interest in taking accounts, and has to declare the amount due to a particular claimant (sections 14 and 15). If the proprietor cannot himself pay the amount so found due, the Special Judge is to submit a report to the Commissioner, who may direct the money to be advanced from the public treasury, repayable with interest at the rate of 5 per cent. per annum by instalments within fifteen years. Section 10 (2) of the Act runs as follows :—

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"Until the Commissioner has declared, as hereinafter provided, that the proprietor has ceased to be subject to the disabilities mentioned in this clause,—

(a) the proprietor shall be incompetent to exchange, give or, without the consent of the Commissioner, sell, mortgage or lease his proprietary rights in land or any part thereof; and

(b) no suit or other proceeding shall be instituted in any civil or revenue court in the United Provinces against those rights in respect of any private debt contracted by the proprietor after the publication of the notice."

The disability created by this section terminates on the Commissioner declaring under section 28 that the proprietor has ceased to be subject to the disabilities mentioned in section 10, sub-section (2), which he (the Commissioner) cannot declare except when the entire sum due has been recovered.



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We have found it necessary to outline the framework of the Encumbered Estates Act as it has been questioned whether Arab Ali Khan was under the disability created by section 10 (2) of that Act, or whether certain circumstances relied on by the appellants necessarily prove that he was. We think, however, that the evidence is conclusive. [After detailing certain evidence, the judgement proceeded.] In view of these circumstances, we think that it is incontrovertible that he was under the disability which section 10 (2) of the Encumbered Estates Act imposes on the proprietors coming within its purview.

The next question of importance is whether the disability contemplated by section 10 (2) of the Act extends to a transaction like the one in question. It is argued that the expression "give", occurring in the section, which alone can be relied on as importing a prohibition against making a *waqf*, is applicable only to cases of gift as defined in the Transfer of Property Act, IV of 1882. Section 10 of the Encumbered Estates Act, it is contended, declares the proprietor to be "incompetent to exchange, give . . . sell, mortgage or lease his proprietary right" and, dealing as the Transfer of Property Act does with transactions of exchange, gift, sale, mortgage and lease, the word "give" in the former has reference to gift as defined in the latter. We are unable to give effect to this contention, as it unnecessarily narrows down the meaning of the word "give," which should be construed in its natural sense as implying a transfer without consideration—a view which is in accord with the object underlying the entire provisions, viz., that a proprietor to whom the benefit of the Act has been extended should keep the property affected by the enactment intact till his liabilities are fully discharged. In every *waqf* there is a transfer of ownership. It is generally without any consideration. The right of the settlor is completely

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extinguished. It vests in the deity to whom it is dedicated for the benefit of mankind. This in substance is the definition of a *waqf* as given in the Waqf Validating Act and most text books on Muhammadan law. In *Sadik Husain Khan v. Hashim Ali Khan* (1), the creation of a beneficial interest in a deed of trust conveying the property to a trustee was held to be a "gift through the medium of a trust." The case is not different where a beneficial interest is created under a *waqf*, which in many aspects partakes of a gift, *inter vivos* or testamentary. Delivery of possession is as essential in case of a *waqf* as in that of a gift. A testamentary *waqf* is, like an ordinary will by a Muhammadan, valid only to the extent of one third of the testator's assets. For these reasons we are of opinion that the word "give" in section 10(2) of the Bundelkhand Encumbered Estates Act, I of 1903, is wide enough to cover a case of giving away property by way of *waqf*, and that Arab Ali was incompetent to make the *waqf* evidenced by the deed dated the 14th of April, 1919. The learned counsel for the defendants appellants would not extend the disability created by the section to the case of property other than that situate within the area to which the Act has been made applicable, and does not contend that such disability is personal, affecting all properties belonging to the person who is declared as incompetent to exchange, give etc. We are therefore relieved of the necessity of entering into a question which could possibly arise. Our view of this part of the case, therefore, is that the *waqf* is invalid as regards the property lying in pargana Arail which is admittedly part of the area to which the Encumbered Estates Act applies and which is separately detailed in the deed in question.

[A portion of the judgement, not material for the purpose of this report, is here omitted.]

(1) (1916) I.L.R., 38 All., 627.

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The result, therefore, is that the *waqf* must be held to be invalid so far as it relates to the landed property of Arab Ali Khan in the pargana of Arail, and the appeal must be allowed to this extent.

[The judgement then proceeded to pass certain orders regarding mesne profits and costs.]

*Decree modified.*

*Before Mr. Justice Kendall and Mr. Justice Niamat-ullah.*

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 June, 21.

HIRA LAL AND OTHERS (PLAINTIFFS) v. PIARI LAL AND ANOTHER (DEPENDANTS.)\*

*Hindu law—Adoption—Authority to adopt given by a member of a joint Hindu family.*

There is nothing to prevent a Hindu who is a member of a joint family giving a valid authority to his wife to adopt a son to him after his death, and the exercise of such authority is not dependent on her inheriting as a Hindu female owner her husband's estate. Such an authority cannot be considered to be extinguished by reason of the other member or members of the husband's family having succeeded to the estate by survivorship.

*Mussumat Bhoobun Moyee Debia v. Ram Kishore Achari Chowdhry* (1), *Sivagunnam Servaigar v. Ramsawmy Chettiar* (2), *Madana Mohana v. Purushothama* (3), *Venkataramier v. Gopalan* (4), *Bachoo v. Mankorebai* (5) and *Pratapsingh Shirsingh v. Agarsingji Rajasangji* (6), referred to.

*Bhimabai v. Tayappa Murarrao* (7), *Adivera Fakirgowda v. Channmallgowda Ramangowda* (8) and *Chandra v. Gojarabai* (9), distinguished.

THE facts of this case sufficiently appear from the judgement of the Court.

\*First Appeal No. 455 of 1925, from a decree of Ganga Prasad Varma, Subordinate Judge of Bulandshahr, dated the 21st of July, 1925.

(1) (1865) 10 Moo. I.A., 279.

(2) (1911) 22 M.L.J., 85.

(3) (1914) I.L.R., 38 Mad., 1105.

(4) (1918) 35 M.L.J., 698.

(5) (1907) I.L.R., 31 Bom., 373.

(6) (1918) I.L.R., 43 Bom., 778.

(7) (1913) I.L.R., 37 Bom., 598.

(8) (1924) 26 Bom., I.L.R., 360.

(9) (1890) I.L.R., 14 Bom., 463.

Sir *Tej Bahadur Sapru* and *Munshi Shiva Prasad Sinha*, for the appellants.

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Mr. *B. E. O'Connor*, *Pandit Shiam Krishna Dar* and *Munshi Krishna Murari Lal*, for the respondents.

KENDALL and NIAMAT-ULLAH, JJ.:—This appeal arises from a suit brought by several of the members of a joint Hindu family for a declaration that an adoption of defendant respondent No. 1, *Piari Lal*, by defendant respondent No. 2, *Musammat Champa Devi*, widow of *Durga Prasad*, was invalid. *Durga Prasad* was, as is now admitted, a member of the joint Hindu family to which the plaintiffs belong when he died in August, 1921. A deed of authority to adopt a son was executed in favour of *Musammat Champa Devi* on the 1st of August, 1921, and registered at the office of the sub-registrar on the same day. But it was claimed that at that time *Durga Prasad* was delirious and unconscious, and that the deed could not be considered to be legally valid. On the facts the lower court has found that the deed was valid. But before considering this part of the case we propose to deal with the legal point that has been argued at some length before us, viz., that even if it be assumed that *Durga Prasad* gave authority to his widow to adopt a son, the power to adopt became extinguished on the death of *Durga Prasad* because his property vested in the plaintiffs by survivorship.

For this proposition, which has been pressed very strongly by *Sir Tej Bahadur Sapru* on behalf of the appellants, no authority of this Court has been cited, nor does it appear that any case raising this particular question of law has ever come before this Court. If the proposition were to be accepted it would follow that a large proportion of the adoptions in this province must

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be held to be invalid. In the well-known case of *Mussumat Bhoobun Moyee Debia v. Ram Kishore Acharj Chowdhry* (1), it has been laid down by their Lordships of the Privy Council that the estate of a deceased son vested in possession cannot be defeated and divested by the mere gift of power of adoption to a widow, and it has been sought to extend this principle and to argue that because Durga Prasad's share in the joint family property became vested at his death in the remaining members of the family, the widow could not defeat or divest them. There are certain obvious objections to this argument, the first of which is that Durga Prasad was not the owner of a defined estate: he could only be said to be the owner of a fluctuating interest in the joint family property, and it does not therefore appear to be accurate to say that on his death his estate vested in the surviving members. The number of sharers in the joint family property became diminished by one on his death, and the number of co-sharers would be increased by one if the adopted son be held to be validly adopted. But that is not the same thing as to say that the estate of Durga Prasad, which never had any separate existence, became vested in the other members of his family. Sir *Tej Bahadur Sapru* claims that the authority of the Bombay High Court is in favour of his argument, and he has quoted the cases of *Bhimabai v. Tayappa Murarao* (2) and of *Adirera Fakirgowda v. Chanmallgowda Ramangowda* (3). Both these cases, however, refer to "ratan" property and not to joint family property under the Mitakshara law. It was held that on the death of the last male owner the property vested immediately in his heirs, and could not be subsequently divested by an adoption made by his mother. In the case of *Madana Mohana v. Purushothama* (4), (the decision of which is

(1) (1865) 10 Moo. I.A., 279.

(2) (1913) I.L.R., 37 Bom., 598.

(3) (1924) 26 Bom., L.R., 360.

(4) (1914) I.L.R., 38 Mad., 1165.

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clearly against the present appellants) the learned CHIEF JUSTICE refers to a previous opinion of his own expressed in the case of *Sivagnanam Serraiyar v. Ramsawmy Chettiar* (1), to the effect that there is no authority to show that the principle of the decision in *Bhoobun Moyee's* case does not apply in the case of a joint family; and this has been quoted in favour of the appellants in the present suit; but the Madras case was concerned with an impartible estate, in which the succession was not by survivorship but by inheritance, and the circumstances of taking in adoption would therefore be entirely different from those of a family in which succession is by survivorship. In the case of *Chandra v. Gojarabai* (2), there is no real analogy to the present case, because Nana, as the last surviving member of a joint Hindu family, had become the full owner of the property and his widow could not be divested by the adoption of a son by his brother's widow. Finally, some reliance has been placed on certain sentences in Mayne's Hindu Law, 9th edition, page 153. It is there remarked that although the distinction between the cases of vesting by inheritance and by survivorship had been the basis of a number of decisions in India, it may be doubted whether this distinction can still be maintained in view of the recent decisions of the Privy Council. The conclusion of the commentator, however, is that the only question hereafter will be whether or not the power has become extinguished by reason of circumstances which have arisen since the grant of power to adopt,—if the authority is alive the question of the vesting of an estate whether by inheritance or by survivorship is immaterial.

None of the cases quoted by Sir *Tej Bahadur Sapru* provides us with sufficient authority for giving what would in these provinces be considered a somewhat re-

(1) (1911) 22 M.L.J., 85.

(2) (1890) I.L.R., 14 Bom., 463.

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volutionary pronouncement, and we should not be disposed to do so even if there were no decisions on the other side. Before referring briefly to one or two of these decisions, however, we may remark that the commentators agree in holding that a widow in a joint Hindu family may adopt a son if she has authority from her husband. On pages 152 and 153 of Mayne's Hindu Law (9th edition) the author remarks:—"The vesting of the estate in an undivided brother or the son of such brother does not terminate the power of adoption. . . . A widow's power of adoption was held to be extinguished for ever as soon as the estate is vested by inheritance in an heir. . . . Where, however, the husband to whom the adoption is made was a member of an undivided family and on his death his share devolved by survivorship on the surviving member or members other than a son, the power would be alive and would continue to be alive until the last surviving member died and the estate vested by inheritance in the next heir." It is after this passage that the one on which the appellants have relied occurs. But, as we have pointed out, the whole of the passage taken together by no means conveys the meaning that the appellants would have us give to it. In Sarkar's Hindu Law of Adoption, second edition, the matter is discussed at some length. On page 252 the learned author remarks:—"The joint family being the normal condition of the Hindus, the adoption by widows of its members, with the deceased husband's assent, presents some difficulty; for the undivided interest of the deceased husband passes from the moment of his death to the surviving male members of the family, and an adoption by his widow of a son to him by his assent alone has the effect of divesting his estate from his co-parceners in whom it was already vested; in fact it has the effect of an alienation of the undivided co-parcenary interest in favour of an adopted son,

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who may be a perfect stranger, without the concurrence of the other members of the family. . . . But, however anomalous an adoption by a widow with her deceased husband's assent may be, it is now recognized in all the minor schools of Mitakshara. . . . Therefore it would appear that, so long as the whole family, or that branch of the family to which the widow's husband belonged, remains joint, there is no bar to the widow's exercising the power of adoption given by her husband."

We have already referred to the case reported in I.L.R., 38 Madras, page 1105, in which the remarks of Mr. Justice SESHAGIRI AYYAR are entirely antagonistic to the contention of the appellants in the present case. Other cases which have been referred to and which favour the respondents are those of *Venkataramier v. Gopalan* (1) and *Bachoo v. Mankorebai* (2). This last case is of special importance in view of the fact that the appellants' learned counsel claimed the authority of the Bombay High Court as supporting him. He would distinguish that case from the present one on the ground that it is not a genuine case of a joint family property. In this we are unable to agree, but, at any rate, it is not a case that can be quoted in the appellants' favour. In the case of *Pratapsingh Shivsingh v. Agarsingji Rajasangji* (3), their Lordships of the Privy Council have held that, unless there is a time limit imposed by the authority which empowers a Hindu widow to adopt, or she is directed to adopt promptly, she may make the adoption so long as the power is not extinguished or exhausted. Her right to make an adoption is not dependent on her inheriting as a Hindu female owner her husband's estate. She can exercise the power even though the property is not vested in her. What circumstance was there in the

(1) (1918) 35 M.L.J., 698.

(2) (1907) I.L.R., 31 Bom., 373.

(3) (1918) I.L.R., 43 Bom., 778.



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present case which exhausted the power of Durga Prasad's widow to adopt a son? The only reply to this question on behalf of the appellant is that it was the death of Durga Prasad and the vesting of his estate in the joint family. It certainly cannot have been the intention of Durga Prasad that his death should exhaust his widow's power to adopt. On the contrary, it is only on his death that the authority is to be exercised. If any fresh inference is to be drawn from the latest rulings of the Privy Council it is this, that even if the estate of Durga Prasad did vest in the remaining members of the joint family, that circumstance in itself would not be sufficient to invalidate an adoption by the widow. It may be remarked that in *Bhoobun Moyee's* case their Lordships were guided by other considerations besides the fact that the estate had vested in a third person, and one of those considerations was that the natural son of the adopting widow had grown to man's estate and had been in a position to perform all those duties which an adopted son would have been called upon to perform; and the inference might well be that the power of adoption, which it had been intended to confer on the widow, had been exhausted. There is no such circumstance here, and on a general review of the authorities and of the opinions of the commentators we are satisfied that where a member of a joint Hindu family has been proved to have given his widow power to adopt, that authority is not automatically exhausted by his death.

[Their Lordships then went on to consider the evidence as to the execution of the authority to adopt. They came to the conclusion—agreeing with the trial court—that the deed was duly executed and that there was no reliable evidence to show that at the time of its execution Durga Prasad was not of sound disposing mind. The appeal was accordingly dismissed.]

*Appeal dismissed.*

*Before Mr. Justice Kendall and Mr. Justice Niamat-ullah.*

MURLI (DEFENDANT) v. GHAMMAR AND OTHERS (PLAIN-  
TIFFS) AND MUNNI (DEFENDANT).\*

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June, 22.

*Hindu law—Joint family property—Alienation—Legal neces-  
sity—Property sold for more than was needed to pay off  
family debts.*

The sale of a house belonging to a joint Hindu family was challenged on the ground of absence of necessity and it was found that the price was Rs. 1,400, out of which Rs. 967 were needed for legitimate family purposes.

*Held* that the result of this finding would not be the setting aside of the sale conditional on a refund of Rs. 967 : but it was necessary to ascertain whether there was any other way in which the sum of Rs. 967 could have been raised by the joint family except by the sale of the house in suit, and an issue was remitted accordingly.

*Sri Krishan Das v. Nathu Ram* (1) and *Gauri Shankar v. Jiwan Singh* (2), followed.

THE facts of this case, so far as they are necessary for the purposes of this report, appear sufficiently from the judgement of the Court.

Babu *Piari Lal Banerji* and *Munshi Kumuda Prasad*, for the appellant.

*Pandit Rama Kant Malaviya*, for the respondents.

KENDALL and NIAMAT-ULLAH, JJ. :—This second appeal arises from a suit brought by some members of a joint Hindu family for a declaration that the deed of sale in respect of their house, dated the 27th of July, 1927, executed by Bhagwan Das on their behalf as next friend when they were minors and by Musammat Munni

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\*Second Appeal No. 281 of 1926, from a decree of K. A. H. Sams, District Judge of Benares, dated the 10th of November, 1925, confirming a decree of Raja Ram, Additional Subordinate Judge of Benares, dated the 27th of July, 1925.

(1) (1926) I.L.R., 49 All., 149.

(2) (1927) 25 A. L. J., 967.

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in favour of the present defendant appellant was invalid, and claiming restoration of possession to the plaintiffs. The sale consideration was Rs. 1,400, and the plaintiffs claimed that there had been no necessity for the execution of the sale-deed. The defence was that the sale had been concluded in order to pay off the plaintiffs' debts, and there was also a plea that Rs. 1,000 had been spent by the defendant appellant on the house.

Both the courts below have found that legal necessity has been proved to the extent of Rs. 967 out of the sale consideration of Rs. 1,400, and they have decreed the plaintiffs' claim on condition that they repay Rs. 967, the sum which is found to have been advanced for legal necessity.

In the light of the recent decisions of their Lordships of the Privy Council it is clear that this finding is not in accordance with the law as at present in force. The sale is either wholly valid or invalid, according as it is found to have been made for necessity or the reverse. It is clear from the case of *Sri Krishan Das v. Nathu Ram* (1) and the case of *Gauri Shankar v. Jiwan Singh* (2), which had not been published when the present suit was before the lower courts, that suits of this nature must be considered from a rather different point of view from the one that used to be favoured in this province. Considerations that would be of importance in order to decide whether it was necessary to sell the house in suit in order to raise a sum of Rs. 967 would be whether the parties concerned had any other property out of which they could meet the necessary expenditure, whether it would not have been possible to raise the sum by mortgage instead of selling the house outright, and matters of a like nature. There is not at present material on the file to enable us to decide this question, and we

(1) (1926) I.L.R., 49 All., 149.

(2) (1927) 25 A.L.J., 967.

therefore remit the following issue to the lower appellate court :—

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v.

GHAMMAR.

“Was there no way in which the sum of Rs. 967 could have been raised by the joint family except by the sale of the house in suit”?

It may be necessary, in order to reply to this question, to find out what the value of the house was in 1917, and if so, or if it is desirable for any other reason, the parties will be allowed to adduce fresh evidence.

The finding on this issue should be returned by October the 20th, and ten days thereafter will be allowed to the respondents for filing objections.

Before Mr. Justice Sen and Mr. Justice Weir.

RUKIA AND ANOTHER (DEFENDANTS) v. MEWA LAL  
(PLAINTIFF).\*

1928

June, 21.

*Civil Procedure Code, order XLI, rule 33—Appeal—Jurisdiction—Competence of appellate court to give a decree in favour of a person not a party to the appeal before it.*

On the death of the plaintiff to a suit as next reversioner to set aside a mortgage made by a Hindu widow an application for substitution was made by one *M*, alleged to be the widow, and *ML*, alleged to be the son of the deceased plaintiff. These persons were brought upon the record, and a decree was passed in favour of *ML* upon the following findings :—(1) that the original plaintiff was a collateral heir of the last male owner of the property claimed; (2) that *M* was his lawful wife; (3) that *ML* was *M*'s son by a former husband and not the son of the last male owner, but by a caste custom he was to be counted as the natural son of the last male owner; (4) that the mortgage in favour of the defendant was without legal necessity.

On appeal by the mortgagee, the finding of the trial court as to the caste custom set up by *ML* was not sustained.

\*First Appeal No. 451 of 1925, from a decree of Kashi Nath, Second Additional Subordinate Judge of Cawnpore, dated the 25th of July, 1925.

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M had not appealed nor was made a respondent; but it was argued that she ought to be given a decree under order XLII, rule 33, of the Code of Civil Procedure.

*Held*, the powers given to a court by order XLII, rule 33, were of a very special nature and should be exercised sparingly; and the present case was not one which called for their use.

The scope of order XLII, rule 33, explained.

*Purnell v. Great Western Railway Company* (1), *Sandford v. Porter* (2), *Attorney-General v. Simpson* (3), *Rangam Lal v. Jhandu* (4), *Simpson v. Attorney-General* (5), *Huntly v. Gaskell* (6), *Rutherford v. Rutherford* (7), *Rutherford v. Richardson* (8), *Mahomed Khaleel Shirazi v. Les Tanneries Lyonnaises* (9) and *Chockalingam Chetty v. Senthai Ache* (10), referred to.

THIS was an appeal relating to a house situate in the city of Cawnpore, which was valued at Rs. 7,000. The house admittedly belonged to one Ishri Das, who died leaving a widow, Musammat Bhagni, and a daughter, Musammat Bhakni. The daughter, who was married to one Gharibe, predeceased her mother without leaving any issue. Gharibe married Musammat Sukhia, who was impleaded as defendant No. 1 in the suit as originally brought. She died during the pendency of the suit in the trial court.

Musammat Bhagni executed a simple mortgage of the house in controversy in favour of Debi Din on the 6th of June, 1921. She died on the 27th of April, 1924. One Chokhey filed a suit *in forma pauperis* on the 26th of May, 1924, for recovery of possession of the house and certain movables on the allegation that he was the reversionary heir of Ishri Das, that the mortgage executed by Musammat Bhagni was without legal necessity; that upon her death Musammat Sukhia, the widow of Gharibe,

(1) (1876) 1 Q.B.D., 636.

(2) (1901) 2 Ch., 671.

(3) (1904) A.C., 476.

(7) (1922) P., 144.

(9) (1926) I.L.R., 49 Mad., 435.

(2) (1912) 2 Ir. R., 551.

(4) (1911) I.L.R., 34 All., 32.

(6) (1905) 2 Ch., 656.

(8) (1923) A.C., 1.

(10) (1927) 26 A.L.J., 371.

and Musammat Rukia, defendant No. 2, who was the daughter of one Bans, uncle of Ishri Das, had taken possession of the property unlawfully, as they were not the heirs of Ishri Das under the law of inheritance.

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The parties to the suit were *Raidas chamars*.

Chokhey, the original plaintiff, died at a very early stage of the suit. On the 3rd of January, 1915, an application was presented by Musammat Mulia for self and as the next friend of Mewa Lal for substitution of names in place of Chokhey, in which it was stated that Mulia was the widow and Mewa Lal the son of the deceased. This application was opposed by Debi Din, who stated that Mewa Lal was not the son of Chokhey, but of one Khushali by Musammat Mulia and that Musammat Mulia was not married to Chokhey. The learned Subordinate Judge directed by his order, dated the 31st of March, 1925, that both Musammat Mulia and Mewa Lal be substituted in place of Chokhey and that it was not necessary to decide at that stage if these two or either of them had a title to the property claimed.

The application to sue *in formâ pauperis* was granted. The defendant Debi Din contested the suit on the ground that Chokhey was not the reversionary heir of Ishri Das; that Mulia was not his widow; that Mewa Lal was not the son of Chokhey but was a *lambera* who came to live with Chokhey when he brought Musammat Mulia to his house, and that the mortgage was for legal necessity.

The Subordinate Judge passed a decree in favour of Mewa Lal for the house. He dismissed the claim of Musammat Mulia, who submitted to the decree and preferred no appeal. He disallowed the claim as to movables. No appeal or cross-objection was filed by Mewa Lal as to the movables.

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The Subordinate Judge recorded the following findings :—(1) Chokhey was a collateral of Ishri Das and was entitled to inherit his property on the death of Musammat Bhagni; (2) Musammat Mulia was married to Chokhey in the "gaonahi" form of marriage which was valid according to the custom of the caste; (3) Mewa Lal was the son of Musammat Mulia by Khushali, her former husband, but as he was brought to the house of Chokhey at the time of her re-marriage he became the son of Chokhey according to the custom of his caste; (4) the plaintiffs had failed to establish the claim as to the movables; (5) the mortgage in favour of Debi Din was without legal necessity.

Debi Din appealed.

Dr. Kailas Nath Katju and Munshi Ambika Prasad, for the appellants.

Pandit Uma Shankar Bajpai and Babu Sailanath Mukerji, for the respondent.

After stating the facts as above, the judgement of the Court (SEN and WEIR, JJ.) went on to discuss the evidence and arrived at the following findings :—

We find on the evidence that the pedigree set up by the plaintiffs is proved and that Chokhey was the reversionary heir of Ishri Das on the date when his widow Musammat Bhagni died.

It is not necessary to make a detailed review of the evidence relating to Musammat Mulia's marriage with Chokhey. The custom of widow re-marriage is admitted by the defendant's witnesses. It is also admitted that Musammat Mulia lived with Chokhey for a long number of years right up to the death of Chokhey. The plaintiffs' witnesses in proof of her marriage with Chokhey have been believed by the court below and no sufficient

reason has been shown to put a different view upon this evidence.

[Their Lordships further found that there was no evidence that Mewa Lal had been adopted by Chokhey, nor was the alleged caste custom by which he was to be considered as a son of Chokhey's established. The judgement then continued :—] No serious attempt has been made to impugn the finding of the court below that the mortgage made by Bhagni in favour of Debi Din appellant was without legal necessity. We hold that the view of the trial court on this point was undoubtedly correct.

On the above findings, the appeal ought to succeed against Mewa Lal, and his suit claiming to be the legal representative of Chokhey, the original plaintiff, ought to be dismissed.

It is argued, however, that although Musammat Mulia did not file an appeal against the dismissal of her claim as the widow of Chokhey, this Court ought to pass a decree in her favour under order XLI, rule 33, of the Civil Procedure Code. Order XLI, rule 33, of the Code of Civil Procedure provides that "The appellate court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection." There was no section in Act XIV of 1882 corresponding to order XLI, rule 33, of Act V of 1908. This rule has been copied, with a few alterations which are purely verbal, from the concluding portion of order LVIII, rule 4, of the Rules of the Supreme Court of Judicature in England.

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The effect of the rule can, therefore, be illustrated by cases in which the corresponding part of the English rule has been applied by the Court of Appeal in England or in Ireland. Though the decisions of these Courts do not bind us, we think we can use them to assist us in applying rule 33. The first of these cases is *Purnell v. Great Western Railway Company* (1). That was an action for damages for negligence, in which one of the questions was whether the persons who had caused injury to the plaintiff were acting as servants of the railway company or of Harris at the time when the accident happened. The jury found against the company and in favour of Harris. The company then moved for a new trial and by order of the court served notice of motion upon Harris. The Queen's Bench Division refused to grant a new trial, and the company appealed to the Court of Appeal; but did not serve notice on Harris. The Court of Appeal ordered service on Harris, and, after hearing him, set aside the verdict in his favour, although the plaintiff had not asked for a new trial as against him and had allowed the time for doing so to elapse. This decision followed and applied the practice at common law in England before the Judicature Act that if one defendant successfully applied for a new trial the court would grant a new trial against all the defendants. A similar course was taken by the Court of Appeal in Ireland in *Sandford v. Porter* (2). Porter was Waine's solicitor. Acting as such, he had marked judgement against the plaintiff and proceeded to levy execution. The judgement was set aside and the plaintiff then sued Porter and Waine for damages for illegal seizure. At the trial the Judge who presided directed a verdict for Waine, and the jury found against Porter. Porter moved for a new trial and served notice of motion upon Waine. When the case came before the Court of Appeal it held that there was a misdirection

(1) (1876) 1 Q.B.D., 696.

(2) (1912) 2 Ir. R., 551.

in favour of Waine and that although the plaintiff had not asked for a new trial against him, the verdict in his favour should be set aside and a new trial should be ordered. In delivering judgement O'CONNOR, M. R., said :—"I hold that the justice of this case is that the defendant, Waine, who wrongfully obtained a verdict at the trial and was the sole author of a miscarriage of justice to the serious prejudice of both the plaintiff and his co-defendant, should be remitted with them to the same position in which they were originally placed. In other words, both verdicts should be set aside and there should be a new trial between the plaintiff and both the defendants." All the members of the Court quoted and relied upon *Purnell's* case. The difference between the two cases of course is that in *Purnell's* case the action was against the defendants alternatively, whereas in the Irish case the defendants were sued as joint wrongdoers. The next case in order of time is that of *Attorney-General v. Simpson* (1), which was quoted by a Full Bench of this Court in *Rangam Lal v. Jhandu* (2). That was a suit by the Attorney-General on behalf of the public for a declaration that the public was entitled to use a certain canal, which ran through the defendant's lands and in which there were several locks belonging to the defendant. The trial court held that the public was entitled to use the canal without paying tolls, but that the defendant was not bound to maintain and work the locks. The defendant appealed from the whole of the judgement except so much as declared that he was not bound to maintain and work the locks. The Court of Appeal varied the judgement by allowing the defendant reasonable tolls on boats passing through the canal when carrying merchandise or other goods; but, although the plaintiff had not appealed from that part of the order which relieved the defendant of any obligation to maintain and work the

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(1) (1901) 2 Ch. 671.

(2) (1911) I.L.R., 34 All., 82.

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locks, the Court declared that the defendant was bound to do so. This decision was reversed by the House of Lords under the name of *Simpson v. Attorney-General* (1), but the jurisdiction of the Court of Appeal to alter part of the judgement although no appeal against that part of it had been taken was not questioned in the House of Lords. The next case is *Huntly (Marchioness of) v. Gaskell* (2), in which a Judge of the King's Bench Division struck out certain paragraphs from the plaintiff's writ on the ground that they were embarrassing and an abuse of the process of the court. The plaintiff appealed, and the Court of Appeal struck out all the endorsements on the writ on the ground that the writ was an abuse of the process of the court; but this was done without prejudice to the right of the plaintiff to bring a fresh suit. The last case is that of *Rutherford v. Rutherford* (3), affirmed by the House of Lords under the name of *Rutherford v. Richardson* (4). That was a wife's petition for divorce, which was granted by the trial court. The adultery alleged and relied on at the trial was adultery on a single occasion with a lady who had obtained leave to intervene. She appealed and the Court of Appeal was satisfied that in fact she had not committed adultery at all with the respondent. The respondent had not appealed, being at the time confined during His Majesty's pleasure as a criminal lunatic. The Court of Appeal directed that the papers should be sent to the King's Proctor, who appeared and contended before the Court of Appeal that the petition for divorce should be dismissed on the ground that, since the Court of Appeal had found, not merely that the evidence against the intervenor was inadequate, but that, as a matter of positive fact, she had not committed adultery with the respondent, the respondent could not possibly have committed adultery with her, and so

(1) (1904) A.C., 476.

(2) (1905) 2 Ch., 656.

(3) (1922) P., 144.

(4) (1928) A.C., 1.

the decree *nisi* could not be upheld. The petition for divorce was accordingly dismissed and a decree for judicial separation was granted. The petitioner appealed to the House of Lords, but the decision of the Court of Appeal was affirmed.

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These cases appear to us to show three things. (1) That the jurisdiction conferred by order LVIII, rule 4, is undoubtedly very wide. (2) That the power (in the words of the rule) "to give any judgement or make any order, which ought to have been made" and to do so even when the appeal is only from part of the decision of the court below, or when all the parties to the original proceedings are not parties to the appeal, will be exercised in England or Ireland in cases where, as was said by the Attorney-General in the course of his argument in *Rutherford v. Rutherford* (1), "it is both logically and legally impossible" that the decision of the Court of Appeal can exist side by side with that part of the decree of the lower court from which there has not been an appeal, or where the result of the conclusions at which a Court of Appeal has arrived affect the legal rights of the parties to the appeal in such a way as to demand a more extensive re-adjustment of those rights than that for which any of them had asked. (3) The fact that since the passing of the Judicature Act there are so few reported cases in which the Court of Appeal in England or in Ireland has exercised the jurisdiction conferred on those Courts by that part of order LVIII, rule 4, with which we are concerned, shows that the jurisdiction is one which should be very sparingly exercised. We may add that the illustration to order XLI, rule 33, of the Code of Civil Procedure appears to be founded upon the decision of the English Court of Appeal in *Purnell's* case already referred to.

Order XLI, rule 33, of the Code of Civil Procedure empowers the court of appeal to interfere with a portion

(1) (1922) P., 144.

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of the decree passed by the primary court against which no appeal or cross-objection has been preferred, and is restricted to cases where, without disturbing the grounds upon which the judgement of the trial court proceeds, the appellate court considers that the decree should be modified in order to do justice to all the parties concerned, including such as have not set the law in motion. If the appellant has failed to appeal from a portion of the decree which was against him, or the respondent has not availed himself of his right to prefer a cross-objection, the appellate court is empowered to readjust the rights of the parties before it where the ends of justice call for such an adjustment. The powers conferred under this rule are very wide, but they are to be resorted to with great care and circumspection, and not as a matter of course but only where strong grounds exist for the exercise of such powers.

The word "parties" in order XII, rule 33, was not intended to connote persons other than those who had been arrayed as appellants or respondents in the appeal. We must keep in view the entire scheme of order XII. We must also consider the significance of the word "parties" in order XII, rule 30, of the Code of Civil Procedure. Where one of the co-plaintiffs has failed to appeal from the dismissal of his claim and the time allowed by the law of limitation for the presentation of the appeal has expired, the necessary consequence is that an important substantive right has accrued in favour of the defendant. The unsuccessful co-plaintiff is not a party to the appeal which has been preferred by the unsuccessful defendant against the successful co-plaintiff. The determination of his right, title or interest in the property is not necessary for the grant of proper or adequate relief to the parties actually before the appellate court. The law of limitation has completely run out against him and the decree against him has become final: He has

not paid the necessary court-fee for an appeal on his behalf. In view of all these circumstances it would be extremely difficult to hold that the legislature could ever have intended to extend order XLI, rule 33, to a person so situated as the co-plaintiff who did not appeal. The latter rule evidently applied to cases where no adequate relief could be granted to the appellant without allowing some consequential relief to the respondent even though the latter had not appealed or preferred a cross-objection. In *Rangam Lal v. Jhandu* (1), RICHARDS, C.J., remarked that the court in exercise of the powers conferred by order XII, rule 33, should not lose sight of the other provisions of the Code of Civil Procedure itself, nor of the Court Fees Act, nor of the law of limitation. He further observed that "the object of order XLI, rule 33, was manifestly to enable the court to do complete justice between the parties to the appeal.—Where, for example, it is essential in order to grant a relief to an appellant that some relief at the same time should be granted to the respondent, the court may grant relief to the latter, even though he has not filed an appeal or preferred an objection." The case of *Mahomed Khaleel Shirazi v. Les Tanneries Lyonnaises* (2), has been relied on by the appellant, but unfortunately it is not exactly in point. In that case, the plaintiff's claim having been dismissed by the trial court, and the plaintiff having submitted to the decree, the question arose whether the plaintiff was entitled to ask the Privy Council to grant him certain relief against the successful defendant, under order XII, rule 33, of the Code of Civil Procedure. It was held by the Judicial Committee that to give effect to the plaintiff's contention would be practically to allow an appeal to His Majesty in Council direct from the decree of the trial Judge and that order XLI, rule 33, of the Code of Civil Procedure was not intended

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(1) (1911) I.L.R., 34 All., 32.

(2) (1926) I.L.R., 49 Mad., 435.

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to apply to such an appeal. In the present case the plaintiff could have appealed to this Court directly. She failed to do so. There is nothing in order XLI, rule 33, to indicate that relief could be granted to a person who is not before the court and whose rights are not the subject-matter of inquiry in the appeal and whose presence is not necessary for the final settlement of any dispute between the parties who are actually before the court, and whose legal rights would not be in any way affected by any decision at which we might arrive after the hearing of this case.

In *Chockalingam Chetty v. Seethai Ache* (1), the question arose whether the plaintiff was entitled to add as respondents certain defendants in the original suit against whom the claim had been dismissed and no appeal preferred. Their Lordships pointed out that the appeal against such respondents was *prima facie* barred by limitation and the respondents were entitled to hold the decree in their favour, which was a substantive right of a very valuable character, of which they should not lightly be deprived. It could not be said that such respondents were "interested in the result of the appeal" within the meaning of those words in order XLI, rule 20, of the Code of Civil Procedure.

Musammat Mulia is not interested in the result of this appeal *quâ* the determination of the rights of the contestants actually before us. If she were to be impleaded, the result would be that she could then put forward a claim in direct opposition to the right of Debi Din on the one hand and to that of Mewa Dal, the so-called son and heir of Chokhey, deceased. Her claim against Debi Din having been dismissed, the latter has, by the finality of the decree, secured a very important substantive right against Musammat Mulia, which ought

(1) (1927) 26 A.L.J., 371.

not to be lightly disturbed. Even on the assumption that the word "parties" is of sufficient amplitude to include a party to the original suit who has not appealed within the statutory period, the presence of Musammat Mulia in the court of appeal is not necessary to grant consequential relief to the plaintiff or the defendant now before the court. She is sought to be introduced, not with a view to grant relief to the parties now before the court; but with the object that the decree of the court below be reversed and discharged and a decree be substituted in her favour against the defendant respondent.

Musammat Mulia is not entitled to make a grievance of the fact that she has been deprived of her rights to the property of Chokhey which she undoubtedly has under the Hindu law. She deliberately came into court with an untrue story, when, in her first application for substitution of names, she set up Mewa Lal as the son of Chokhey. When she was forced to abandon that position she put forward the plea that, according to a custom prevailing amongst the chamars, a step-son is entitled to succeed to the estate of the step-father. It is to be remembered that Musammat Mulia is not a *pardah-nashin* lady and is not hampered by the disabilities peculiar to ladies of the *pardah*. Throughout the trial she acted as the guardian of her son Mewa Lal, and she pleaded the custom already referred to, whereby Mewa Lal and not she, was heir to the estate of Chokhey.

She in fact does not appear to have ever cared to fight for the property for herself, and the real object of her suit was to instal her son Mewa Lal in place of Ishri Das, to which he had not the shadow of a claim.

In view of all these circumstances, we do not think that we should be justified in passing a decree in favour of Musammat Mulia, even if it were lawful to do so under order XLI, rule 33, of the Code of Civil Procedure.

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We accordingly allow the appeal, set aside the decree of the court below and dismiss the plaintiff's suit. In view of the fact that both the parties had freely engineered false evidence we direct that they should bear their own costs both here and heretofore.

*Appeal allowed.*

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### FULL BENCH.

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*Before Mr. Justice Boys, Mr. Justice Weir and Mr. Justice King.*

1928  
June, 25.

#### IN THE MATTER OF A VAKIL OF AZAMGARH.\*

*Act No. XXXVIII of 1926 (Bar Councils Act), sections 2, 8, 10 and 19—Letters Patent, section 8—Vakil—Disciplinary action of High Court—Procedure.*

As and from June 1, 1928, the procedure by which an advocate can be called upon to answer for misconduct is governed by section 10 and the following sections of the Bar Councils Act, 1926. To proceed under section 10, the High Court is required by sub-section (2) of that section, if it does not summarily reject the complaint, either to refer the case for inquiry to the Bar Council, or after consultation with the Bar Council, to refer it to the Court of a District Judge. Similar powers of reference are given where the Court, instead of acting on a complaint, acts on its own motion. But, in either event, it is necessary for the case to be either referred to the Bar Council, or at any rate for the Bar Council to be consulted.

This was a reference under the Legal Practitioners Act. The facts of the case, so far as they are necessary for the purposes of this report, appear from the judgment of the Court.

The Government Advocate, (Mr. U. S. Bajpai,) for the Crown.

The applicant appeared in person.

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\*Miscellaneous Case No. 552 of 1928.

BOYS, WEIR and KING, JJ.:—In this case what purported on the face of it to be a notice to Madho Prasad Khanna, Vakil, of Azamgarh, was issued from this Court purporting to call on him to show cause why he should not be dealt with under the Legal Practitioners Act in that he was guilty of professional misconduct in respect of certain facts which were then set out. The notice was dated 13th of June, 1928.

The reference to the Legal Practitioners Act, while it is an error, is not an error of any material importance. The Court, apart from another objection that has been taken, would have had power to deal with Madho Prasad Khanna under section 8 of the Letters Patent.

Another objection has, however, been taken which goes to the root of the matter. The Bar Councils Act, XXXVIII of 1926, received the assent of the Governor-General on the 9th of September, 1926. By section 1, sub-section (3) it was provided that section 1 and sections 2, 17, 18 and 19 should come into force at once; while the rest of the Act, or any portion thereof, should come into force in respect of any High Court upon such date as the Governor-General-in-Council might by notification in the *Gazette of India* determine. By the notification published in the *Government of India Gazette*, Part I, page 400, dated April 7, 1928, the Governor-General in Council notified the 1st of June, 1928, as the date on which the rest of the Act was to come into force for the purposes of this High Court. By that notification, then, section 8 came into force as and from the 1st of June, 1928, and the roll required by section 8, sub-section (2), was prepared, and persons entered on that roll, whatever may have been their status before, became advocates of the Court by virtue of section 2, clause (a). By section 19, sub-section (2) of the Act, which actually came into force by virtue of its own provisions at the

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same time as section 8, though it is declared by section 1, sub-section (2), that it should come into force at once, the provisions of the Letters Patent in so far as they may conflict with the provisions of the Act were abrogated and the new procedure detailed in section 10 of Act XXXVIII of 1926 came into force.

The result is that as and from the 1st of June, 1928, the procedure by which an advocate can be called upon to answer for misconduct is governed by section 10 and the following sections. To proceed under section 10, the High Court is required by sub-section (2) of that section, if it does not summarily reject the complaint, either to refer the case for inquiry to the Bar Council, or after consultation with the Bar Council to refer it to the court of a District Judge. Similar powers of reference are given where the Court instead of acting on a complaint acts on its own motion. But in either event it is necessary for the case to be either referred to the Bar Council or at any rate for the Bar Council to be consulted.

It appears, therefore, that this Court is not at present at any rate properly seised of the case and has no jurisdiction to proceed with it. We, therefore, refrain from saying anything further than that the Court is not properly seised of the case and that the notice issued to Madho Prasad Khanna to show cause is, as framed, *ultra vires* and a nullity. It will be for the High Court to decide whether further action should be taken under section 10 of the Bar Councils Act, 1926.

## FULL BENCH.

*Before Mr. Justice Sulaiman, Acting Chief Justice,  
Mr. Justice Mukerji and Mr. Justice Boys.*

RAM GOPAL (PLAINTIFF) v. TULSHI RAM AND ANOTHER  
(DEFENDANTS).\*

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July, 3.

*Compromise—Family arrangement—Is not an exchange, and may be oral—Petition signed by claimants in mutation proceedings—Want of registration, effect of —Act No. XVI of 1908 (Indian Registration Act), sections 17, 49—Act No. I of 1872 (Indian Evidence Act), section 91—“Part performance”, doctrine of—How far applicable to India.*

Where an application for mutation of names was contested and then all the parties, by a joint application, stated that they had arrived at a compromise and asked for mutation to be made in the names of the several parties in certain shares, and order was made and possession was taken by the parties accordingly, and shortly thereafter the original applicant sued to recover the whole property against the other parties, who set up the compromise as a bar: *Held,—*

In the usual type of family arrangement, unless any item of property which is admitted by all the parties to belong to one of them is allotted to another, there is no “exchange” or other transfer of ownership. A binding family arrangement of this type can be made orally, and if made orally, no question of registration arises.

If such arrangement is followed by a writing containing reference to it, then the question is whether thereby the terms of the arrangement have been “reduced to the form of a document”, i.e. formally recorded in a document with the purpose that they should be evidenced by that document, and that is a question of fact in each case to be determined upon a consideration of the nature and phraseology of the writing and the circumstances in which and the purpose with which it was written.

\*Second Appeal No. 1427 of 1925, from a decree of V. E. G. Hussey, District Judge of Meerut, dated the 8th of May, 1925, confirming a decree of Mohammad Aqib Nomani, Munsif of Meerut, dated the 3rd of February, 1925.

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If such arrangement was in fact "reduced to the form of a document", registration (when the value is Rs. 100 or upwards) is necessary by section 17 of the Registration Act, and the absence of registration makes the document inadmissible in evidence, under section 49 of the Registration Act, in proof of the arrangement, and under section 91 of the Evidence Act no other proof thereof can be given.

If the terms were not "reduced to the form of a document" registration was not necessary, even though the value is Rs. 100 or upwards; and while the writing cannot be used as a document of title, it can be used as a piece of evidence for what it may be worth, e.g., as corroborative of other evidence or as an admission of the transaction or as showing or explaining conduct.

Where it has been found that there is no legally binding oral family arrangement, or that the arrangement, though reduced to writing with the intention that the document should be the document of title, cannot be proved for want of registration, and where no question of estoppel arises, the mere facts that mutation has taken place and that possession has been taken cannot remedy, by virtue of what is known to English law as the doctrine of "part performance", the absence of registration.

The positive rules of law, contained, for example, in the Transfer of Property Act, cannot be overridden by the doctrine of part performance, which is an equitable doctrine which arose in connection with the English Statute of Frauds.

*Trigge v. Lavallee* (1), *Rani Meera Kuwar v. Rani Hulas Kuwar* (2), *Khunni Lal v. Gobind Krishna* (3), *Hiran Bibi v. Sohan Bibi* (4), *Chokhey Singh v. Jote Singh* (5), *Maddison v. Alderson* (6), *Salamat-uz-Zamin v. Mashallah Khan* (7), *Mulraj Khatau v. Vishwanath Prabburam* (8), *Maung Shwe Goh v. Maung Inn* (9) and *Arseculeratne v. Perera* (10), referred to. *Mahomed Musa v. Aghore Kumar Ganguli* (11) distinguished. *Kunti v. Gajraj Tiwari* (12), not approved.

(1) (1862) 15 Moo. P.C., 270.

(8) (1911) I.L.R., 33 All., 356.

(5) (1908) I.L.R., 31 All., 73.

(7) (1913) I.L.R., 40 All., 187.

(9) (11916) I.L.R., 44 Cal., 542.

(11) (1914) I.L.R., 42 Cal., 801.

(2) (1874) L.R., 1 I.A., 157.

(4) (1914) 18 C. W. N., 929.

(6) (1883) L.R., 8 App. Cas., 467.

(8) (1912) I.L.R., 37 Bom., 198.

(10) (1928) A.C., 173.

(12) (1924) I.L.R., 46 All., 847.

THE facts of the case are fully set forth in the judgment of the Court.

Babu *Piari Lal Banerji*, for the appellant.

Munshi *Ram Nama Prasad*, for the respondents.

SULAIMAN, A. C. J., MUKERJI and BOYS, JJ. :—  
This case has been referred to this Full Bench for determination of certain questions relating to the law governing "family arrangements". On the death of one Nathua in the first quarter of the year 1924, an application for mutation was made by Ram Gopal, the present plaintiff appellant, a first cousin of Nathua. On the 31st of March, 1924, objections were filed by Tulshi Ram, Munshi Lal and Duli Chand, grandsons of Ram Gopal's great-uncles. Their objection took the form of an allegation that Ram Gopal's father had been adopted into another branch of the family and Ram Gopal had, therefore, lost all right to succeed to Nathua's property. On the 24th of April, 1924, Ram Gopal and the three objectors, by a joint application, stated that they had arrived at a compromise and asked for mutation to be made in Ram Gopal's name as to one-third, in the names of Tulshi Ram and Munshi Lal as to one-third, and in the name of Duli Chand as to the remaining one-third, and on the 3rd of May, 1924, order was made accordingly. On the 6th of August, 1924, Ram Gopal filed a suit against Tulshi Ram, Munshi Lal and Duli Chand, defendants Nos. 1, 2 and 3 respectively, claiming the whole property. Duli Chand did not contest the suit but supported the plaintiff's claim. Munshi Lal, defendant No. 2, also put in no appearance, but apparently left his brother Tulshi Ram, defendant No. 1, to contest the suit. Ram Gopal's father's adoption was again pleaded but was held by both the lower courts not to have been established. Both courts, however, held that there had been a family arrangement which was

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binding, and, therefore, while a decree was passed in favour of the plaintiff as regards the one-third of Duli Chand, the suit was dismissed as regards the one-third which had been allotted to Tulshi Ram and Munshi Lal. The appeal to this Court came before a Single Judge, who referred it to a Division Bench and that Bench has referred to this Full Bench the three following questions :—

“(1) Whether in India, where the Transfer of Property Act is in force, a family arrangement dealing with immovable property of the value of Rs. 100 and upwards can be effected by an oral contract?

(2) If the oral contract be followed by a joint petition in a mutation court, containing the terms of the settlement, in the shape of a request to the court to record the names of the parties in a particular manner, whether that petition, being an unregistered document, may be treated as substantive evidence of the terms of the settlement?

(3) If mutation of names takes place in terms of the joint petition and possession is taken under it, whether, before the possession of the defendant has lasted for the space of 12 years, the rightful owner is precluded from claiming the property to which he is entitled, it being assumed that no question of estoppel by conduct arises against him?”

(This third question we have re-drafted in the form set out by us later at the place where we answer it.)

The answer to the *first question* depends upon whether a family arrangement may be said to constitute a transfer of property within the meaning of the Transfer of Property Act. Section 9 of the Transfer of Property Act lays down that a transfer of property may be made without writing in every case in which a writing is not expressly required by law. The only form of transfer dealt with in the Transfer of Property Act,

within the limits of which it can be suggested that a family arrangement comes, is transfer by exchange. Section 118 of the Transfer of Property Act says:—  
 “When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing nor both things being money only, the transaction is called an exchange.” We have, therefore, to determine whether by a family arrangement dealing with immovable property there is any transfer of the ownership in certain property for the ownership of certain other property. It is only necessary to mention some of the cases on this point to which we have been referred. In *Trigge v. Lavallee* (1), it was said that a compromise “is an agreement to put an end to disputes and to terminate or avoid litigation, and in such cases the consideration which each party receives is the settlement of the dispute; the real consideration is not the sacrifice of a right but the abandonment of a claim.” In *Rani Mewa Kuwar v. Rani Hulas Kuwar* (2) it was said:—“The compromise is based on the assumption that there was an antecedent title of some kind in the parties and the agreement acknowledges and defines what that title is.”

We may pause here to note that this definition of the basis of a compromise only of course covers cases in which the title to all the property covered by the family arrangement was in doubt. Where any property, in regard to which there was no doubt as between the parties that its ownership rested in one of the parties, is brought within the scope of the family arrangement and is allotted to one of the other parties it may be that *qua* that property there would be a transfer of ownership. But no such consideration arises in the present case. In *Khunni Lal v. Gobind Krishna* (3), their Lordships said, at p. 367:—“Each one relinquishing all

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(1) (1882) 15 Moo. P.C., 270 (292). (2) (1874) L.R., 1 I.A., 157.

(3) (1911) I.L.R., 33 All., 356.



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claim in respect of all property in dispute other than that falling to his share, and recognizing the right of the others as they had previously asserted it to the portion allotted to them respectively. It was in this light, rather than as conferring a new distinct title on each other, that the parties themselves seem to have regarded the arrangement": And their Lordships again re-asserted the proposition which we have just quoted from *Rani Mewa Kuwar v. Rani Hulas Kuwar*. In *Hiran Bibi v. Sohan Bibi* (1) their Lordships said:—"A compromise of this character is in no sense of the word an alienation by a limited owner of the family property, but is a family settlement in which each party takes a share of the family property by virtue of the independent title which is, to that extent and by way of compromise, admitted by the other parties."

These pronouncements of their Lordships of the Privy Council are sufficiently clear to put it beyond doubt that in the usual type of family arrangement in which there is no question of any property, the admitted title to which rests in one of the parties, being transferred to one of the other parties, there is no transfer of ownership such as is necessary to bring the transaction within the definition of "exchange" in section 118 of the Transfer of Property Act.

We hold, therefore, that a binding family arrangement of this type may be made orally.

While, however, this is the law, the extreme undesirability, except in the most simple cases, of leaving such an arrangement to be founded on an oral agreement is manifest. Cogent evidence of such an oral agreement would obviously be necessary and any party who is interested in such an agreement being upheld and yet does not insist upon a written instrument, duly registered

(1) (1914) 18 C.W. N., 929.

where the value is Rs. 100 or upwards, clearly omits to do so at his peril.

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*The second question* states a particular case, one of a type of very frequent occurrence in one form or another. We thought it desirable, therefore, to consider the question in a wider aspect. Having determined that a binding family arrangement may be made by a purely oral agreement, we will next consider if the whole or part of the terms of an arrangement, dealing with property of the value of Rs. 100 or upwards, is found to have been put into writing in one form or another, but the writing has not been registered, is the writing admissible in evidence, and, if so, for what purposes, and to what extent if at all is the arrangement binding?

We have been referred to a number of cases, but most of them, as is inevitable, deal with a particular set of facts, much as does the particular second question referred to us. As we are, however, of opinion that there is nothing in those cases which conflicts with our view of the law as appearing in section 91 of the Evidence Act and sections 17 and 49 of the Registration Act, we do not think it necessary to refer particularly to those cases.

Section 91 of the Evidence Act declares that "when the terms of a contract . . . . . have been reduced to the form of a document . . . . . no evidence shall be given in proof of the terms of such contract . . . . . except the document itself . . . . ."

The questions arise here : (1) Does the arrangement amount to a contract? (2) Was the matter "reduced to the form of a document"? If it was a contract and its terms were reduced to the form of a document, then, where the value of the subject-matter was Rs. 100 or upwards, by section 17 of the Registration Act registration was compulsory.

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By section 49 of the Registration Act no document required by section 17 to be registered shall, unless it has been registered, affect any immovable property comprised therein, or be received as evidence of any transaction affecting such property.

That a family arrangement is based on contract we have no doubt. It may be, and no doubt is, a transaction to which certain considerations apply which do not apply to many other contracts, but it is an agreement enforceable by law and is therefore at least a contract.

Whether the terms have been "reduced to the form of a document" is a question of fact in each case to be determined upon a consideration of the nature and phraseology of the writing and the circumstances in which and the purpose with which it was written. For instance—

(a) If the terms were merely quoted in a letter by one party to a friend, this would not constitute a "reduction to the form of a document", a phrase which connotes the idea that the oral agreement is being formally recorded in a document with the intention that it should be evidenced by that document.

(b) If the oral arrangement is followed immediately, or after an interval (shorter or longer), by a petition in court containing a reference to the arrangement (either a mere reference to the fact of there having been an arrangement, or a partial or complete setting out of the terms, with or without a declaration of an acceptance of and intention to be bound by those terms), the question whether the reference was merely for the purpose of informing the court or was dictated by a desire to make formal record of the arrangement to be evidenced by the document will have to be determined on the facts of each case.

We emphatically refuse to suggest the weight to be attached to any particular fact. In one case it may be

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that a statement in such a petition as that we have mentioned in the second instance that we have given, to the effect that the parties have agreed or do agree to be bound by the terms set out, may appear conclusive as indicating their intention that that petition should constitute the formal record of the arrangement. In another case it may be that there is independent evidence proving beyond doubt the express intention of the parties that subsequent to that document there should be executed a formal instrument which the parties will duly register, which would show that no final settlement had been arrived at. The value in either case to be attributed to the particular statement may be wholly different. It will be for the court to consider all the facts, striking and important or otherwise, and to allot them their due weight.

If, after weighing all the facts, the court has arrived at the conclusion that the terms of the arrangement were not "reduced to the form of a document" for the purpose of recording the arrangement, then registration would be unnecessary, the document not purporting to declare, etc., any title. It would not, therefore, by virtue of section 49 of the Registration Act, be rendered inadmissible in evidence.

But, *ex hypothesi*, not being a document of title it cannot be used as a document of title; it can only be used as a piece of evidence, e.g., as corroborative of other evidence or as an admission of the transaction or as showing or explaining conduct. As to the worth of such a document in evidence we need only say that it is for the court to determine its worth; but, in view of the absence of a formal registered instrument where the circumstances are such that a formal instrument might be expected, the admission of the transaction or the conduct evidenced by the document may, in the absence of other evidence, be quite inadequate by itself to prove

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that the parties had come to a final arrangement intended to be binding on them.

If it has been found that the arrangement was reduced to the form of a document for the purpose of formally recording the arrangement, and, though the value is of Rs. 100 or upwards it was not registered, the absence of registration makes the document inadmissible in evidence and is fatal to proof of the arrangement indicated in the document.

*The third question* which was formulated as set out at the beginning of this judgement may, in the light of the answers already given, be re-stated thus:—"Where it has been found that there is no legally binding oral family arrangement, or that the arrangement, though reduced to writing with the intention that the document should be the document of title, cannot be proved for want of registration, and where no question of estoppel arises, can the mere facts that mutation has taken place and that possession has been taken remedy, by virtue of what is known to English law as the doctrine of 'part performance', the absence of registration"?

We have to assume for the purpose of answering this question that there is no valid family arrangement which binds the parties and no legal title in law vests without a registered document, and under which possession has been taken: for we have held above that, to effect a family arrangement, under the present law prevailing in India, it is not necessary to execute a formal document. Where the family arrangement has been acted upon, by the parties taking possession in pursuance of it, the question formulated in question No. 3 will never arise. The possession, in that case, of a party would be lawful and no question of "the rightful owner" will ever arise. The question, therefore, pre-supposes that there is no valid compromise or family arrangement binding on the parties, and yet, by mutual agreement,

the parties have taken possession and, after the party who is not legally entitled to the property has been in possession for some time, the rightful owner brings a suit for possession, there being nothing in the whole transaction to estop him from maintaining the suit. The answer to such a question can only be in the negative.

The present case is very similar to the case of *Chokhey Singh v. Jote Singh* (1). In that case, on the decease of a Hindu, his brother and the sons of another brother who predeceased the deceased made a joint application to the revenue court in the following language : —“ Jote Singh, own brother of the deceased, is in possession of half of the *haqiat* of the deceased, and Chokhey Singh and Gajraj Singh in equal shares, after deducting the *jethansi* right of Chokhey Singh at the rate of 4 per cent., are in possession of the other half of his share. There is no other legal heir except the deponents. The mutation in respect of the deceased's share in all the villages should be allowed and nobody has any objection thereto ”. The courts in India and the Privy Council found as a fact that, in spite of this application in the revenue court, there was no evidence which would indicate that there was a compromise between the parties. The application stated that the parties, the brother on the one hand and the nephews on the other, were in possession of the property in equal shares (except a small share given to the uncle by way of *jethansi*), that they were the only heirs of the deceased and that the property should be recorded accordingly. Their Lordships said that this mutation of names, by itself, conferred no proprietary title. In the opinion of their Lordships there was no bar to the plaintiff's success and the plaintiff did succeed. It is noteworthy that the defendants had set up several pleas to defeat the

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(1) (1908) I.L.R., 31 All., 78,

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plaintiff's title. They were all inquired into and were all decided against the defendants.

The principle to be deduced from the case of *Chokhey Singh* is that where there is no binding agreement acknowledging title, the mere fact that the contending parties agreed to divide the property in certain shares, for a time, did not preclude the rightful owner from claiming what was his due, in a court of justice. The only bar that might arise against the rightful owner would be one of 12 years' adverse possession. *Ex hypothesi*, there is no such bar in the question we have to answer. As already indicated, our answer therefore should be in the negative. In the course of the argument, the doctrine of part performance was relied upon as being an effective answer to the plaintiff's claim and we proceed to discuss the same.

The doctrine is sought to be applied in this way. It is said that if there be no valid compromise proved, the proceeding amounts to this that the rightful owner agrees orally that a part of his property should go to the other party, and although a deed of transfer in writing and registered would be necessary, the defect is cured by the fact that possession is taken under the oral contract.

The doctrine of part performance is a doctrine of equity, evolved in England under the following circumstances. In the year 1677, the Statute of Frauds was passed in the following language:— "Section 4. No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, or to charge any person upon any agreement made in consideration of marriage, or upon any contract or sale of lands, tenements or hereditaments, or any interest in

or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized ”.

It will be noticed that this law did not nullify the contract. The contract held good. The only obstacle that was created in the way of the parties to the contract relating to land and other contracts was that the contract could not be enforced in a court of justice. Anson in his Law of Contract (Sixteenth Edition, 1923) at pp. 88 and 89 says :—“ It remains to consider what is the position of parties who have entered into a contract specified in section 4 (Statute of Frauds), but have not complied with the provisions of the section. Such a contract is neither void nor voidable, but it cannot be enforced by action because it is incapable of proof.”

The result of this enactment was that perfectly good contracts under which parties had taken possession could not be enforced in law. The courts of equity sought out means to relieve this difficulty, on the theory that a statute to guard against fraud should not be allowed to so operate as to encourage fraud. On this theory, the courts of equity held themselves justified in taking up the following position. They said : “ Very well, we cannot look into the contract for want of a written document, but there is no bar to a party proving the fact that possession has been taken or something else has been done in pursuance of the contract which is not in writing. We shall allow a party to show how possession came to be changed, and, in doing so, the original contract will be discovered.”

That this was the view taken of what was termed “part performance” will be abundantly clear from the

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judgement in *Maddison v. Alderson* (1). Even in England, the doctrine of part performance was acquiesced in with great reluctance. In the case quoted above, Lord BLACKBURN, at p. 489, remarked that the result of the introduction of the doctrine of part performance has been the addition of the following words to the Statute, viz., "or unless possession of land shall be given and accepted." His Lordship remarked that if the matter had been *res integra* he would have refused to interpolate those words, but that the matter was not such; and he added:—"If it was originally an error, it is now, I think, *communis* error and so makes the law."

It is not necessary, to understand the English doctrine of part performance clearly, to quote further cases decided in England on the point. The principal question which we have to answer is whether this doctrine which is peculiar to English law, can be introduced in India, having regard to its peculiar laws.

The case of *Mahomed Musa v. Aghore Kumar Ganguli* (2) has been very often relied on to show that their Lordships of the Privy Council were prepared to extend this doctrine to India. There can be no doubt that their Lordships, in the course of the decision of the case, did mention this doctrine and did say that they did not think that there was anything either in the law of India or England inconsistent with the doctrine laid down in the case of *Maddison v. Alderson* quoted above. But their Lordships did not decide the case on the ground of part performance, and must be understood to have laid down that where writing is necessary for the purpose of proving a contract in a court of law, the defect of its absence may be cured if that contract has been acted upon, provided the validity of the contract itself

(1) (1883) L.R., 8 App. Cas., 467.

(2) (1914) I.L.R., 42 Cal., 801

did not depend on the writing. That case is as follows :—

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Before the Transfer of Property Act came into force, a certain mortgagee and mortgagor agreed that the mortgage should be extinguished and the mortgagee should become the owner of a part of the mortgaged property. The mortgagor, having thus obtained possession over a portion of the mortgaged property, transferred the same. Nobody questioned the transaction for 30 to 40 years. Then a legal representative of the original mortgagor claimed redemption. The terms of the agreement arrived at between the mortgagor and mortgagee had been incorporated into an application of compromise and had been incorporated in the decree. The High Court of Calcutta were of opinion that the two together were sufficient to establish that the mortgage had been extinguished. Their Lordships of the Privy Council themselves said at p. 814 of the report :—“ It is impossible to read the *razinama* without concluding that the mortgage debts were to be thenceforward for ever extinguished, that the property itself was to be divided among the parties ” (mortgagor and mortgagee) “ in specific shares, and that with regard to one share it was to become and be dealt with by Khodajannessa as her separate property disburdened of debt.” The compromise was made a rule of the court and the decree effectually defined the rights of the parties. Their Lordships were pressed with the contention that no written conveyance in favour of the mortgagee had been executed by the mortgagor. Their Lordships pointed out that the transaction took place before the Transfer of Property Act was passed, and no written conveyance was necessary. After having said so, their Lordships proceeded to remark that “even if a transfer in writing had from a conveyancing point of view been omitted”, their Lordships were of opinion

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that that fact would have been unavailing to the appellants (plaintiffs). The grounds given were that the compromise had been acted upon and parties had parted with the properties given to them by the compromise. Leaving aside the ambiguity of the expression "from a conveyancing point of view", it is clear that their Lordships had in mind the requirement of a writing for a transfer and not such stringent provisions as that of a necessity of registration.

The question that we have to answer is whether, having regard to the law enacted in the Transfer of Property Act, it is open to say that where a transfer could be effected only by a registered document, the doctrine of part performance can be brought into play in order to establish the transaction without the production of the required document. For example, if two parties agree on an exchange of immovable properties of the value of more than Rs. 100, can it be said that the mere fact that the parties have taken possession of each other's property will pass title without a title deed, which must under the law be in writing and registered?

We need hardly repeat that in the case of the Statute of Frauds in England, the contract itself is good and valid and passes title. In India no title passes whatsoever, where it is compulsory to have a registered document to pass title. The conditions, therefore, in India and England are not identical. A rule of equity can never be put forward to annul a positive enactment. There may be cases where a plaintiff seeking to recover property over which he has delivered possession to the other party may be defeated on the ground of personal estoppel, although his title to the land remains intact. But that is because of the personal estoppel and not because the plaintiff has no title, having lost it on account of the doctrine of part performance.

Under the United Provinces Tenancy Act of 1901 (now repealed), a mortgage of occupancy holdings was declared to be illegal. People, however, were accustomed to make usufructuary mortgages of their occupancy holdings under a misconception of law. Where any such mortgagor brought a suit to recover his occupancy holding from the mortgagee on the ground that the mortgage was illegal, the plaintiff was always granted his relief, but on the equitable condition that he restored the money he had taken from the defendant mortgagee. In a case like this, the plaintiff could succeed only if he was in a position to restore the benefit he had received under the illegal or incomplete transaction. On the other hand, where the plaintiff is not in a position to restore the advantage, the courts in India, being courts both of law and equity, would not allow the plaintiff to succeed. To go back to the illustration of an exchange of property without a deed of exchange, the properties being worth Rs. 100 or more, let us suppose that the plaintiff has sold away the property which he himself got from the defendant in exchange of his own property. Although for want of a title-deed the defendant's title is incomplete and he is bound to hand over the property to the rightful owner, the plaintiff (the rightful owner), being unable to return the defendant's property to him, would not be granted any relief. A case like this arose in this Court and is that of *Salamat-uz-zamin v. Mashallah Khan* (1). WALSH, J., decided the case against the plaintiff on the doctrine of part performance, but the other learned Judge, PIGGOTT, J., held that the plaintiffs, although they could still call themselves the owners of the property, were bound by the agreement not to eject. The true answer, however, to the plaintiff's case was that he was not in position to restore the property. PIGGOTT, J., was not prepared to extend

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(1) (1913) I.L.R., 40 All. 187.

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the doctrine of part performance to this country, having regard to the law prevailing in India. This case in I. L. R., 40 All., was followed by WALSH and RYVES, JJ., in this Court in the case of *Kunti v. Gajraj Tiwari* (1), reversing a judgement of this Court in a Letters Patent Appeal.

So far as this Court is concerned, we have only the views of two learned Judges, WALSH and RYVES, JJ., against the views of an equal number of Judges, PIGGOTT and GOKUL PRASAD, JJ.

To go back to the principle governing the doctrine of part performance, we have to see, where there is no personal estoppel against the plaintiff's success, whether he should be shut out on the ground of "equities" although those equities might go in the teeth of the law. Under the Bengal, North-Western Province and Assam Civil Courts Act, the courts in the province of Agra are to act "according to justice, equity and good conscience, where there is no law governing the case." (Section 37) On express enactment, therefore, rules of equity will not come in to override the law.

Now we propose to examine cases decided by their Lordships of the Privy Council after the case of *Mahomed Musa*, referred to above. The doctrine of equitable mortgage or mortgage by deposit of title deeds is essentially a creation of rules of equity and is a part of the doctrine of part performance. Williams, in his famous book on Real Property, (24th Edition, 1926) says at p. 685: "Notwithstanding this stringent provision of the Statute of Frauds to the contrary, it was held by a court of Chancery that such a deposit (of title deeds), even without writing, operated as an equitable mortgage of the estate of the mortgagor in the lands comprised in the deeds." Although this is the state of

(1) (1924) I.L.R., 46 All., 847.

English law, their Lordships of the Privy Council refused to apply the same in a case from India. In the case of *Mulraj Khatau v. Vishwanath Prabhuram* (1) a certain person borrowed money from the defendant and, as security, handed over his policy of life insurance to him. A rival creditor, later on, obtained an assignment of the policy by an instrument in writing. The question arose, which of the two creditors had the better title. The High Court of Bombay decided, on appeal from the trial court, that the party holding the policy had acquired a charge by way of equity over the money payable under it. The Privy Council held that the Bombay High Court were in error and that "the error arose from the learned Judges not having appreciated that the positive language of the section" (section 130 of the Transfer of Property Act, which said that on execution of an instrument in writing the title would pass) "precluded the application in India of the principles of English law on which they based their decision."

In the case of *Maung Shwe Goh v. Maung Inn* (2), their Lordships had to consider how far a mortgagee became the owner of the property in pursuance of an agreement of sale but without a sale deed. The Chief Court at Burma applied the rules of English law and their Lordships remarked:—"In the English courts, a contract for sale of real property makes the purchaser the owner in equity of the estate, and from this principle it follows that, where the rights as to payment of interest on the purchase-money are not regulated by the terms of the contract, the purchaser is deemed to be entitled to the rents and profits of the property, as from the time when he did take or could safely have taken possession . . . . . The underlying principle, upon which this rule depends, has no application to the sale of real

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(1) (1912) I.L.R., 37 Bom., 198.

(2) (1916) I.L.R., 44 Cal., 542.

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estate in Lower Burma, since by section 54 of the Transfer of Property Act of 1882 it is expressly provided that such a contract creates no interest in or charge upon the land." Their Lordships refused to apply the principles of equity prevailing in England in the teeth of positive enactment in India.

A very recent case which went up before their Lordships of the Privy Council from the Supreme Court of Ceylon is that of *Arscculeratne v. Perera* (1). It appears that under the law prevailing in Ceylon, no agreement for sale, transfer or mortgage of land could be effected except in writing, signed and attested by a notary and two witnesses; and by section 21 of Ceylon Ordinance VII of 1840 no agreement of partnership "shall be of force or avail in law" unless it is in writing and signed; and by section 22 it was enacted that nothing in section 21 was to exempt any instrument affecting land from being executed and attested as required by section 2. The parties entered into an agreement of partnership to work a mine. They worked it together for four years and then abandoned it. In a suit for dissolution of partnership and other reliefs the question arose, how far the doctrine of part performance was available to the plaintiff, having regard to the fact that the deed of partnership was unattested. Their Lordships, at p. 179, said: "Both the case last cited and the doctrine of part performance have reference to section 4 of the English Statute of Frauds, and as they have no application to the more stringent provisions of clause 2 of the Ordinance by which an agreement as to land not duly attested by a notary and two witnesses is rendered of no force or avail in law."

From the later decisions of their Lordships of the Privy Council it would be abundantly clear that by their

(1) (1928) A.C., 173.

pronouncement in *Mahomed Musa's* case their Lordships never meant that the positive rules of law contained, for example, in the Transfer of Property Act, might be overridden by the doctrine of part performance.

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We do not propose to examine cases decided in other courts. It would be sufficient to say that on the whole the Madras and Bombay High Courts are of opinion that the doctrine of part performance cannot override the provisions of the Transfer of Property Act as regards sale, mortgage, exchange, gift and lease. In the Calcutta High Court there are a few cases in which countenance has been given to the doctrine of part performance, but on an examination of these cases it will be found that in some of the cases at least the plaintiff could not succeed on grounds of personal estoppel, and the cases could have been decided without calling into aid the doctrine of part performance.

We hold that there is no bar to the rightful owner from claiming the property in the circumstances mentioned in the question and that the doctrine of part performance cannot be called into aid by the defendant.

We would, therefore, return the reference with a statement of the following general propositions:—

*With reference to the first question.*

1. A family arrangement can be made orally.
2. If made orally, there being no document, no question of registration arises.

*With reference to the second question.*

3. If, though it could have been made orally, it was in fact “reduced to the form of a document”, registration (when the value is Rs. 100 and upwards) is necessary.



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4. Whether the terms have been "reduced to the form of a document" is a question of fact in each case to be determined upon a consideration of the nature and phraseology of the writing and the circumstances in which and the purpose with which it was written.

5. If the terms were not "reduced to the form of a document", registration was not necessary (even though the value is Rs. 100 or upwards); and, while the writing cannot be used as a document of title, it can be used as a piece of evidence for what it may be worth, e.g., as corroborative of other evidence or as an admission of the transaction or as showing or explaining conduct.

6. If the terms were "reduced to the form of a document" and, though the value was Rs. 100 or upwards, it was not registered, the absence of registration makes the document inadmissible in evidence and is fatal to proof of the arrangement embodied in the document.

*With reference to the third question.*

7. Where it has been found that there is no legally binding oral family arrangement, or that the arrangement, though reduced to writing with the intention that the document should be the document of title, cannot be proved for want of registration, and where no question of estoppel arises, the mere facts that mutation has taken place and that possession has been taken cannot remedy, by virtue of what is known to English law as the doctrine of "part performance", the absence of registration.

With these answers let the reference be returned.

Before Mr. Justice Sulaiman, Acting Chief Justice,  
Mr. Justice Mukerji and Mr. Justice Boys.

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Act No. IX of 1908 (Indian Limitation Act), articles 123, 144—*Suit by an heir of a deceased Muhammadan for his share of the inheritance, against his co-heirs and the transferees from some of them—Plaintiff alleging joint possession with, and subsequent adverse possession by, co-heirs—Article 144 applies.*

Where, after the death of a Muhammadan, one of the heirs is dispossessed by his co-heirs from the property left by the deceased, or has not obtained possession and later on the co-heirs in possession set up a title and execute a transfer inconsistent with his rights, and he then brings a suit against the co-heirs (and their transferees) for recovery of possession of his share, the suit is not one for a distributive share of the property of an intestate, but is a suit for possession of the defined share of one co-owner which is in the adverse possession of the other co-owners. Such a suit is not governed by article 123, but by article 144, of the Limitation Act.

Article 123 of the Limitation Act applies to those suits in which the plaintiff seeks to obtain his legacy or share from a person who, as administrator, represents the estate of a deceased person and is under a legal duty to pay legacies and distribute shares to those entitled to them.

The Privy Council case of *Maung Tun Tha v. Ma Thit* (1), explained and distinguished.

*Umardaraz Ali Khan v. Wilayat Ali Khan* (2), *Khadersa Hajec Bappu v. Puthen Veettil Ayissa* (3), *Aziz-ul-Haq v. Mariyam Bibi* (4), *Bashir-un-nissa Bibi v. Abdur Rahman* (5), *Kallangowda v. Bibishaya* (6) and *Nuridin Najbudin v. Bu Umrao* (7), followed. *Mahomed Riasat Ali v. Hasin Banu* (8), referred to. *Shirinbai v. Ratanbai* (9), *Sri Rajah Partha-*

\*Appeal No. 72 of 1926, under section 10 of the Letters Patent.

(1) (1916) I.L.R., 44 Cal., 379.	(2) (1896) I.L.R., 19 All., 169.
(3) (1910) I.L.R., 34 Mad., 511.	(4) (1914) 17 Oudh Cases, 157.
(5) (1921) I.L.R., 44 All., 244.	(6) (1920) I.L.R., 44 Bom., 943.
(7) (1920) I.L.R., 45 Bom., 519.	(8) (1898) I.L.R., 21 Cal., 157.
(9) (1918) I.L.R., 43 Bom., 845.	

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*sarathy Appa Rao v. Sri Rajah Venkatadri Appa Rao* (1) and *Venkatadri Appa Rao v. Parthasarathi Appa Rao* (2), distinguished.

THE facts of the case are fully set forth in the judgments of the Court.

Munshi Narain Prasad Asthana (for whom Mr. Zahur Ahmad) and Maulvi Mushtaq Ahmad, for the appellants.

Dr. N. C. Vaish, for the respondents.

SULAIMAN, A. C. J. :— This appeal has been referred to a Full Bench for considering whether the observations of their Lordships of the Privy Council in the case of *Maung Tun Tha v. Ma Thit* (3) have the effect of overruling the previous rulings of this Court.

The appeal arose out of a suit brought by the plaintiffs for recovery of a three-eighth share in the estate of Wazir Khan deceased against his widow, daughter and daughter's son. It appears that Wazir Khan died about 1908, and his legal heirs were his widow Musammat Janki, his daughter Musammat Dhora, and the present plaintiffs, who are the sons of the first cousin of Wazir Khan. Under the Muhammadan law they became entitled to a three-eighth share. The property consists of zamindari, paying a small amount of revenue. On the 1st of February, 1921, Musammat Janki executed a deed of gift in favour of her daughter and daughter's son. The plaintiffs claimed that from that moment the defendants' possession became adverse, and they were entitled to recover their share. Both the courts below held that article 144 of the Limitation Act applied to the case, and that possession did not become adverse till 1921. The suit was accordingly decreed. On appeal a learned Judge of this Court came to the conclusion that in view of the pronouncement of their Lord-

(1) (1922) I.L.R., 46 Mad., 190.

(2) (1925) I.L.R., 48 Mad., 312.

(3) (1916) I.L.R., 44 Cal., 379.

ships of the Privy Council in the case mentioned above, the suit must be taken to be governed by article 123, and having been brought more than 12 years after the death of Wazir Khan, was barred by limitation. The decree was reversed and the suit was dismissed.

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Mr. *Zahur Ahmad*, who had prepared the case thoroughly, placed before us all the relevant rulings in his opening address. There can be no doubt that prior to 1916 the view which prevailed in all the High Courts in India was that a suit brought by a Muhammadan co-heir against another co-heir for possession of his legal share was not governed by article 123 at all. The leading case in this Court is *Umaradaraz Ali Khan v. Wilayat Ali Khan* (1). The learned Judges who decided that case thought that article 123 referred to a suit in which a plaintiff seeks to obtain his share from a person who, either as an executor or an administrator, represents the estate of a deceased person and is under a legal obligation to distribute shares to those entitled to them. They relied on a Madras case as well as on the case of *Mahomed Riasat Ali v. Hasin Banu* (2). But in the last-mentioned case, decided by their Lordships of the Privy Council, the plaintiff widow was claiming the whole of the movable and immovable estate under a family custom, and not a fractional share in it. Their Lordships therefore held that article 123 was not applicable to the case.

The view of this Court was accepted by a Full Bench of the Madras High Court in the case of *Khadarsa Hajee Bappu v. Puthen Veettil Ayissa* (3). In that case article 123 was held to be inapplicable to a suit for possession of immovable property by a co-heir, and article 144 was considered to be applicable.

(1) (1896) I.L.R., 19 All., 169. (2) (1893) I.L.R., 21 Cal., 157.  
(3) (1910) I.L.R., 34 Mad., 511.

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The same view was followed in the case of *Aziz-ul-Haq v. Mariyam Bibi* (1), which was a suit for possession of immovable property, and it was held by LINDSAY, J. C., that article 144 and not article 123 applied. This has been re-affirmed by this Court in the case of *Bashir-un-nissa Bibi v. Abdur Rahman* (2).

The Burma case of *Maung Tun Tha v. Ma Thit* (3) was not exactly a case brought by a co-heir against another co-heir for possession of his legal share. Under a peculiar Burmese law property is held jointly by husband and wife, and, on the death of either, the eldest son, if he claims his share, is entitled to get one-fourth separated. But if he does not make his claim promptly and get his share partitioned, he has to wait until the other parent's death, when all the other children would be entitled to shares. The suit was brought by the eldest son after 6½ years from the death of his father. There was no question of 12 years' limitation at all. The main defence was that under the Burmese law the plaintiff, not having got his share separated promptly, was disentitled from getting it, and that share had merged in the joint estate. The High Court had remarked that they were not concerned with the period of limitation. The learned Judges conceded that if the plaintiff had demanded his one-fourth share promptly after his father's death and the same had been refused, he would have 12 years from the date of his father's death. But they dismissed the suit, holding that the right to claim a one-fourth share ought to be exercised as soon as possible after the parent's death, and as the appellant had not exercised that right at all, it lapsed altogether. The counsel for the plaintiff before their Lordships of the Privy Council assumed that the case was governed by article 123, and urged that the suit was within limitation. Article 144 was neither mentioned nor discussed.

(1) (1914) 17 Oudh Cases, 157.

(2) (1921) I.L.R., 44 All., 244.

(3) (1916) I.L.R., 44 Cal., 379.

There was no need to refer to article 144 as 12 years, even under article 123, had not expired. Their Lordships held that the plaintiff was at liberty to assert his right within the period fixed by article 123. Under the Burmese law it appears that there is an obligation on the surviving parent to allow the eldest son to have his one-fourth share segregated, and the rulings of the Burma High Court clearly lay down that such a suit is governed by article 123. But the principle underlying that decision does not apply to heirs under the Muhammadan law which gives distinct and definite shares to each heir, whose share does not lapse on account of any delay, and which does not impose any obligation to get the share separated or segregated promptly.

None of the previous cases which had applied article 144 were cited before or considered by their Lordships, and they cannot be deemed to have been overruled, as the principles underlying them are quite different.

No doubt there are certain observations in the case of *Shirinbai v. Ratanbai* (1), showing that the learned Judges thought that the pronouncement of their Lordships of the Privy Council had displaced the line of Indian cases. But the Bombay case itself was very peculiar. A suit was brought against the representatives of an executor, and the prayer *inter alia* was that the estate should be administered. It was in such a case that the Bombay High Court held that article 123 was applicable. In two subsequent cases the same High Court has applied article 144:—*Kallangowda v. Bibishaya* (2) and *Nuridin Najbudin v. Bu Umrao* (3).

In the last-mentioned case, at page 522, FAWCETT, J., observed that proper force should be given to the word “distributive” in article 123, that the article could not be construed as if that word had no force, and the

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(1) (1918) I.L.R., 43 Bom., 845. (2) (1920) I.L.R., 44 Bom., 943.

(3) (1920) I.L.R., 45 Bom., 519.

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article was meant to cover the case of any claim for a share of the property of an intestate. The learned Judge pointed out that the word "distribution" under the English law has a particular meaning, and was generally applied to the division of the personal estate of an intestate which has vested in an executor or administrator. The omission of the word "movable" from the corresponding article of the Limitation Act of 1877 makes that article applicable both to movable and immovable property in India.

The case of *Sri Rajah Parthasarathy Appa Rao v. Sri Rajah Venkatadri Appa Rao* (1), was one for a share in a legacy against executors *de son tort*. SCHWABE, C. J., observed that article 123 applied to suits for legacies against any person rightly or wrongly in possession of the estate under such circumstances that he is bound to deal with it as the estate of the deceased. COURTTS TROTTER, J., was of the same opinion and, at page 210, held that article 123 applied to a case where the person sued is not an executor but a person who is in possession of the estate in circumstances which render him accountable in equity to those having claims upon the estate. KUMARASWAMI SASTRI, J., also held, at page 248, that there was no reason why the suit should not fall under article 123 when it is a suit for a legacy and is against a person who has in law all the duties of an executor cast on him owing to his having intermeddled with the estate or having taken possession of the assets.

In the judgements of the learned Judges there were references to the Burma case decided by their Lordships of the Privy Council, and the three Bombay cases referred to above. This case is particularly important because it went up in appeal before their Lordships of the Privy Council, whose judgement is to be found in the case of *Venkatadri Appa Rao v. Parthasarathi Appa Rao* (2).

(1) (1922) I.L.R., 46 Mad., 190.

(2) (1925) I.L.R., 48 Mad., 312.

On the facts the case is clearly distinguishable, because it was a suit to recover legacies bequeathed by a testatrix pure and simple. Article 123, therefore, undoubtedly applied. The only question was as to the starting point of limitation. At pages 325 and 326 their Lordships referred to the use of the words "payable" and "deliverable" in the third column of the article, and in that case held that looking at article 123 as one of general application to such suits, the interpretation to be put on the words would be that "a share in the property of an intestate would not be 'deliverable' until the administrator, to whom letters of administration had been granted, had in his hands the share to be delivered, and, similarly, a legacy or share in a legacy does not become 'payable' until the executor or other person liable to pay it has in his hands money with which it could be paid." Their Lordships accordingly attached great significance to the use of the words "payable or deliverable". Under the article time does not begin to run from the date on which the testator or the ancestor died, but from the date when the legacy or share becomes payable or deliverable.

I think that these observations lend support to the view as regards the meaning of article 123 which had prevailed in this Court. It is also clear from what we have said above that the case of *Maung Tun Tha v. Ma Thit* (1) has not the effect of overruling the cases of this Court even by implication.

When a Muhammadan owner dies leaving several heirs, they all become co-owners and tenants-in-common. A joint owner is legally entitled to retain possession of joint property. Even if he is in exclusive possession of such joint property, his possession is ordinarily to be referred to his legal title. The presumption, therefore, is that his possession is lawful and therefore on behalf of all the co-owners. The other co-owners are accordingly

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in constructive possession of the property. As distinct shares have devolved on them, they all are presumed to have taken their legal shares although possession still remains joint. If, therefore, the co-owner in actual possession dispossesses any one of the other co-owners, the suit that is brought for recovery of possession is not a suit for a distributive share of the property of an intestate, but is a suit to recover possession of the defined, though undivided, share of the co-owner in the possession of the other co-owners. Such a suit is not covered by article 123 at all and must fall under the general article 144, limitation running from the date when the defendant's possession became adverse.

I would accordingly allow this appeal, set aside the decree of this Court, and restore the decrees of the courts below with costs in all courts.

MUKERJI, J.—This is a Letters Patent Appeal, which, as usual, came before a Bench of two Judges. It was referred to a larger Bench, as it was found necessary to have the Privy Council case of *Maung Tun Tha v. Ma Thit* (1) authoritatively interpreted in this Court.

The facts, briefly, are these. One Wazir Khan died, it is not definitely said when, but we may take it, a little over 12 years prior to the institution of the suit out of which this appeal has arisen. He left him surviving a widow Musammat Janki, a daughter Musammat Dhura and two agnates, being the sons of a first cousin on the paternal side, who are the plaintiffs in the suit. The plaintiffs, according to the Muhammadan law of the Sunni sect, to which, according to the finding of the courts below, Wazir Khan belonged and the parties belong, would be entitled to three-eighth of the property left by Wazir Khan. The plaintiffs state in the plaint that they were living jointly with Musammat Janki and Musammat Dhura and were thereby in the enjoyment of Wazir Khan's property. Musammat Janki, however,

(1) (1916) L.L.R., 44 Cal., 379.

on the 1st of February, 1921, purported to make a gift of the entire property of Wazir Khan in favour of her daughter Dhura and Dhura's son Nur Khan, a minor, and thereby gave the plaintiffs to understand that they had no interest whatsoever in Wazir Khan's property. Putting forward this date, namely the 1st of February, 1921, as the date of the rise of the cause of action, the plaintiffs sued for recovery of their share of the property, and for Rs. 40 mesne profits. It may be mentioned, incidentally, that they claimed 7 out of 16 shares, but it was found that they were entitled to a little less, namely 6 out of the 16 shares, or 3 out of 8 shares, as already stated.

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The findings of the courts below are that the plaintiffs never lived jointly or together with the defendants, viz. Musammat Janki and Dhura, and that they never obtained possession over any portion of Wazir Khan's property. The courts below, however, took the view that the possession of Musammat Janki and Musammat Dhura, being the possession of co-owners, was, *prima facie*, possession of the plaintiffs, and that the defendants' possession did not start adversely to the plaintiffs till the deed of gift was executed on the 1st of February, 1921. Applying article 144 of schedule 1 of the Limitation Act, they decreed the suit for the share found due and a small amount of mesne profits.

When the matter came up to this Court on appeal by the defendants, a learned Judge of this Court thought that the view of this Court, that in a case like the present article 144 of the Limitation Act applied, had been effectively set aside by their Lordships of the Privy Council in the case quoted in the beginning of this judgement, and holding that the suit was time-barred, ordered the dismissal of the suit.

The question for determination is whether the judgement of the Privy Council has really laid down that

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article 123 of schedule I of the Limitation Act is the proper article to be applied to a case like the present.

Interp. J.

To rightly understand the decision in the case of *Maung Tun Tha v. Ma Thit* (1), it is necessary to see what were the facts of the case. It appears that under the Burmese-Buddhist law of succession, on the death of a father the eldest son is entitled to a fourth share in the property, which is taken as the joint property of the two parents. If the eldest son does not claim his one-fourth share, and the mother dies, the entire property of the two parents becomes divisible among all the children of the parents. An eldest son, in the case before their Lordships of the Privy Council, claimed his one-fourth share, a little over six years after the death of the father. He was met with the plea that it was his duty to claim the quarter share, if he wanted to claim it at all, without delay, and the fact that he made the delay of 6½ years disentitled him from recovering the property. The ground on which this plea was urged was that the divisible share of the children, on the death of the mother, was likely to fluctuate from time to time and it was the duty of an eldest son, who wanted his quarter share, to take it at once. The contention on the part of the plaintiff was that he had 12 years, under article 123 of the Limitation Act, within which to enforce the delivery of his one-fourth share. The courts in Burma found against the plaintiff, on the authority of a previous ruling of the Chief Court of Lower Burma. In appeal before their Lordships of the Privy Council the learned counsel for the appellants urged that the plaintiff had 12 years under article 123 of the Limitation Act of 1908 to enforce his claim and the learned Judges of the Chief Court in Burma were not right in holding that the period of limitation could be cut down on the considerations on which

(1) (1916) I.L.R. 44 Cal. 379.

they professed to act. In the Privy Council their Lordships found that in the Burmese-Buddhist law there was nothing to indicate that the son was bound to claim his quarter share at once on the death of the father, and pointed out that he could claim it within the period of limitation fixed by article 123 of the Limitation Act.

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It will be noticed that there was no question of limitation in the case before their Lordships. The plaintiff himself contended that he had 12 years under article 123, and it was nobody's case that article 144 applied and not article 123. On the other hand, the case of the defendant was that there was no question of limitation at all and the plaintiff was bound to exercise, what was called his "option" in claiming his quarter share, as soon as possible, under the circumstances of the case, after the death of the father. In the circumstances, in my opinion, there is no weight in the argument that their Lordships of the Privy Council laid down what article of limitation would apply where, on the death of the owner of a property, one of the heirs sues another of the heirs for recovery of property.

On an examination of article 123 of the Limitation Act it will be found that it was never meant to apply to a case like the one before us. The first column which prescribes the nature of the suit is as follows: "For a legacy or for a share of a residue bequeathed by a testator or for a distributive share of the property of an intestate." The period of limitation is 12 years; and in the third column, the time from which the period begins to run is described as follows: "When the legacy or share becomes payable or deliverable."

The portion of the entry in the first column with which we are concerned is,—“for a distributive share of the property of an intestate.” The corresponding entry in the third column is, “when the share becomes payable or deliverable.” The word “distributive” in

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the first column must be given its natural meaning and cannot be ignored. The word "distributive", according to Webster's International Dictionary, means "dealing to each his proper share." This meaning would imply that there is somebody whose duty it is to "distribute" to the several heirs their respective shares. Looking again to the third column, we have the words "payable" and "deliverable." These words again indicate that there is somebody who has to pay the legacy and to deliver the distributive shares of the property. A consideration of the expressions and words used in article 123 leads to the irresistible conclusion that the article applies where there is an administrator administering the estate of a person who has died without making a will, it being the duty of such administrator to pay or deliver the legacy or share.

The learned single Judge of this Court quoted two cases, one decided by the Bombay High Court and the other decided by the Madras High Court, as showing that those Courts had accepted the view taken by the learned Judge himself of the Privy Council case. The case of *Shirinbai v. Ratanbai* (1) did not really raise a question of limitation. The suit in that case would be within time whether article 123 or article 144 applied. If some of the observations of the Judges might be taken as supporting the view of the learned single Judge of this Court, we can point out that in two subsequent cases that view was abandoned by at least one of those Judges who were responsible for the decision in I. L. R., 43 Bombay. These cases are *Kallangowda v. Bibishaya* (2) and *Nuridin Najbudin v. Bu Umrao* (3).

The case of *Sri Rajah Parthasarathy v. Sri Rajah Venkatadri* (4) was a suit for a legacy and it was held by the High Court and also by the Privy Council

(1) (1918) I.L.R., 43 Bom., 845.

(3) (1926) I.L.R., 45 Bom., 519.

(2) (1926) I.L.R., 44 Bom., 943.

(4) (1922) I.L.R., 46 Mad., 190.

in appeal (for appellate judgement see I. L. R., 48 Mad., 312) that the legacy did not become payable till the executor had sufficient funds in his hands to pay. In this particular case it was held that a perfect stranger, intermeddling with the estate of an intestate, might be treated as an executor *de son tort* and held liable.

It seems to me abundantly clear that their Lordships of the Privy Council never said anything in the case from Burma, *Maung Tun Tha v. Ma Thit* (1), which may be taken to have unsettled the law which was taken to be settled in this country. See, for example, the case of *Khadersa Hajee Bappu v. Puthen Veettil* (2).

In the result I would allow the appeal, set aside the decree of this Court and restore the decrees of the two lower courts and allow the appellants their costs of both the hearings in this Court.

BOYS, J.—I agree with the conclusions arrived at by the ACTING CHIEF JUSTICE and Mr. Justice MUKERJI.

BY THE COURT.—This appeal is allowed, the decree of this Court is set aside and the decrees of the courts below restored with costs in all courts.

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KHAN  
P.  
JANKI.

(1) (1916) I.L.R., 44 Cal., 379.      (2) (1910) I.L.R., 34 Mad., 511.

## APPELLATE CIVIL.

*Before Mr. Justice Mukerji and Mr. Justice Bennett and upon reference.*

*Before Mr. Justice Subhman, Acting Chief Justice.*

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May, 3, 5.  
July, 3.

MISHRI LAL (DEFENDANT) v. GOPI CHARAN AND OTHERS  
(PLAINTIFFS).<sup>\*</sup>

*Act (Local No. II of 1901 (Agra Tenancy Act), sections 95, 167—Jurisdiction—Civil and revenue courts—Relinquishment of occupancy tenure by a widow in a Hindu family—Suit by members of family against zamindar and widow for declaration that widow had no title and the relinquishment was void—Declaratory decree—Discretion.*

The plaintiffs brought a suit in a civil court, alleging themselves to be the occupancy tenants of the defendant No. 2 (the zamindar) in respect of a certain holding, and asking for a declaration that the defendant No. 1, a widow of the plaintiffs' family, in whose name the holding was recorded, had no concern with it and a deed of relinquishment executed by her in favour of the zamindar was null and void and not binding on the plaintiffs. The zamindar alone contested the suit and raised, *inter alia*, the plea of jurisdiction.

*Held by* SULAIMAN, A. C. J., and MUKERJI, J., (BENNETT, J., dissenting) that the cognizance of the suit by the civil court was barred by section 167 of the Agra Tenancy Act (II of 1901). For the purpose of that section it was essential to look at the substance and real object of the suit and not merely the form of the relief asked for. The nature of the dispute was such that substantial relief could be given and the dispute effectively disposed of by the revenue court in a properly framed suit, namely a suit under section 95 of the Tenancy Act, which, as the plaintiffs alleged themselves to be the tenants of the defendant zamindar, they could have brought in the revenue court.

Until the plaintiffs established, as against the zamindar, their status as occupancy tenants the declaration sought by

<sup>\*</sup>Second Appeal No. 2171 of 1925, from a decree of H. J. Collister, District Judge of Farrukhabad, dated the 24th of August, 1925, reversing a decree of S. Maitra, Additional Subordinate Judge of Farrukhabad, dated the 32nd of December, 1923.

them could not be granted; and as it would, in the circumstances, be a *brutum fulmen* even if it were granted, the court should in its discretion refuse to grant it.

*Dori Lal v. Sardar Singh* (1), *Birham Khushal v. Sumera* (2), *Ram Charitra v. Jinsi Ahirin* (3), *Jagannath v. Balwant Singh* (4) and *Badri Kasaundhan v. Sarju Misr* (5), referred to.

*Per BENNET, J.*—As the plaint asked only for a declaration, under section 39 of the Specific Relief Act, in regard to a document and not a declaration about legal status under section 42 of that Act, and as there was neither a suit pending in, nor a prior decree of, the revenue court in regard to the matter in suit, and the plaintiffs were in cultivating possession, the suit was cognizable by the civil court, which was the proper court in which such a declaratory suit was to be brought.

The declaration, if granted, would be of use to the plaintiffs in the revenue court, as they would then be able to apply for revision of the order passed by the Collector, under section 40 of Act III of 1901, altering the Khatauni on the basis of the relinquishment.

*Suba Bibi v. Raghubir Singh* (6), *Ramdhari Rai v. Ramdhari Rai* (7), *Chhote Lal v. Sheopal Singh* (8), *Jaigopal Narain Singh v. Uman Dat* (9), *Brij. Kumar Lal v. Sheo Kumar* (10) and *Fateh Singh v. Gopal Narain* (11), referred to.

*Munshi Binod Bihari Lal*, for the appellant.

The respondents were not represented.

*MUKERJI, J.*—This is an appeal by one of the two defendants in the suit out of which this appeal has arisen. Certain persons, who were all minors, came to court on the allegation that they were occupancy tenants of a certain holding, of which the defendant No. 2 the present appellant, is the zamindar, that the holding

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|----------------------------------|-----------------------------------|
| (1) (1908) 5 A.L.J., 514.        | (2) (1913) I.L.R., 35 All., 299.  |
| (3) (1913) I.L.R., 36 All., 48.  | (4) (1922) I.L.R., 44 All., 692.  |
| (5) (1913) I.L.R., 36 All., 55.  | (6) (1909) 7 A.L.J., 291.         |
| (7) (1909) 7 A.L.J., 305.        | (8) (1910) I.L.R., 33 All., 335.  |
| (9) (1911) 8 A.L.J., 695.        | (10) (1915) I.L.R., 37 All., 444. |
| (11) (1925) I.L.R., 48 All., 88. |                                   |

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was recorded in the name of defendant No. 1, Musammat Tulsha, who was the widow of a member of a joint Hindu family governed by the Mitakshara law and had no interest in the tenancy, and that the said defendant No. 1 executed a deed of relinquishment in favour of the zamindar. The date of the relinquishment is the 11th of August, 1921. The suit was instituted on the 19th of December, 1922, for the following relief:—

"It may be declared that the plaintiffs are the occupancy tenants of the holding given below, and Musammat Tulsha the defendant No. 1 has no concern with the said holding and that the relinquishment relied upon by the defendant No. 2, which is fictitious, fraudulent and collusive, is ineffectual against the plaintiffs."

The defendant No. 2 alone contested the suit and he pleaded, *inter alia*, that the suit was not cognizable by the civil court. In the course of the proceedings in the court below, the learned vakil for the plaintiffs stated that he wanted to withdraw his claim regarding the declaration that the plaintiffs were the occupancy tenants of the holding in question and he confined his suit to the relief as to the cancellation of the document of relinquishment.

The courts below held that the suit was cognizable by them, but they differed on the question whether Musammat Tulsha was or was not the real tenant of the land. The court of first instance dismissed the suit on the ground that the plaintiffs had failed to establish that they were the tenants and not Tulsha. The learned District Judge came to the conclusion that Tulsha's husband could not possibly have himself acquired the tenancy and as he predeceased his father while he was quite young, it must be taken that it was his father who acquired the tenancy. In this view of the facts the learned Judge came to the conclusion that the plaintiffs were the occupancy tenants and he accordingly gave the declaration

that the deed of relinquishment executed by Musammat Tulsha was null and void as against the plaintiffs.

In this appeal the only question that has been urged is that the suit was not cognizable by the civil courts.

We had not had the advantage of hearing counsel for the respondents, for the latter are unrepresented in this Court. The learned counsel for the appellant, however, has laid before us a good many rulings and we do not think that the absence of the respondents' counsel has made any difference in the assistance which we have obtained in the case.

The learned counsel for the appellant has argued that the relief to which the suit has been confined is a relief of no real consequence to the plaintiffs, that the sole object of the suit is to obtain a declaration that they are the occupancy tenants of the land and that the name of Musammat Tulsha was recorded nominally. If Musammat Tulsha was a female member of a joint Hindu family holding a tenancy, she would have no interest in the property and her position would be no better than that of a man in the street. Merely because a person without title, under whom the plaintiffs do not claim, purports to renounce her title the plaintiffs will not have a right to obtain a declaration that the transaction is not binding on them. The granting of a declaratory relief is entirely within the discretion of the court and that discretion has to be exercised judicially. As I have already stated, if Musammat Tulsha is no better than a man in the street the deed of relinquishment executed by her cannot do any harm to the plaintiffs. The execution of the deed of relinquishment by Tulsha is not the real reason of the suit. The real reason of the suit is that the appellant, the zamindar, is not willing to treat the plaintiffs as his tenants and the plaintiffs want a declaration that the recorded tenant was nobody and that they were the real tenants. This substantial relief, which

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the plaintiffs had sought for in the beginning, and which they withdrew later on, could be obtained by the plaintiffs only by the institution of a suit under section 95 of the Agra Tenancy Act and in no other way. Section 167 of the same Act debars a civil court from exercising jurisdiction in a matter in which a suit of the nature provided in the Act may be brought. This Court, in numerous cases, has explained the force of section 167 by laying down that in order to find out whether the substantial relief asked for is or is not to be obtained by an application or suit in the revenue court we have to look to the object of the suit and should not confine our attention only to the reliefs asked for in the plaint. This is a view of the law with which I entirely agree. In *Dari Lal v. Sardar Singh* (1), according to the head-note, one *D* applied to the revenue court authorities that his adoptive father *I* was in joint cultivation with him and that his name should be recorded in respect of *I*'s holding. Having failed there, he brought a suit in the civil court to obtain a declaration that he was joint in cultivation with *I* and was the adopted son of *I*. It was held that although a suit for a declaration that the plaintiff was an adopted son of a particular person was maintainable in the civil court, the nature of the suit was such as could be taken cognizance of and substantial relief could be granted by the revenue court. The suit was accordingly held not maintainable in the civil court. Again in *Birham Khushal v. Sumera* (2), the son of a deceased occupancy tenant filed a suit against the zamindar in the civil court for two reliefs. One was for a declaration that he was the son and lawful heir of the late tenant and the other was for possession. It was held that although the first relief could be granted by the civil court, so far as the second relief was concerned the plaintiff's remedy was barred in the revenue court by 6 months' rule of

(1) (1908) 5 A.M.L., 511.

(2) (1913) I.L.R., 35 All., 299.

limitation and it was, therefore, not proper for the civil court to grant a declaration. At p. 301 the learned Judges state: "Such a suit (for possession), if it be now brought by the plaintiff, could not succeed. Therefore, to grant a declaration that he is the legitimate son of Jhau, would be of *no use to him now*. It could not be followed up by a suit for possession in the revenue court. In these circumstances, in our opinion, the suit must fail."

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Again in *Ram Charitra v. Jinsi Ahirin* (1), the plaintiff filed a suit for a declaration in the civil court that she was the legally married wife of one who was dead and who was the tenant of a certain holding. It was held that the suit was not maintainable in the civil court. The reasons given are similar to those given in the earlier cases. Again in *Jagannath v. Balwant Singh* (2), the declaration that was sought for in the civil court was that one Govind was not the adopted son of Lalji. It was held that a suit under section 95 (a) or 95 (b) of the Agra Tenancy Act could be filed in the revenue court to obtain substantially the relief wanted and the suit was barred from the cognizance of the civil court.

The law is now, so far as this Court is concerned, clearly established that one must look to the substance and object of the suit and not merely, superficially, to the reliefs prayed for. If we apply this principle to the particular case before us we find that the object of the plaintiffs' suit is to obtain a declaration that the plaintiffs are the occupancy tenants. Whether a third party, having no interest, according to the plaintiffs' own allegation, in the property in suit, purported to relinquish the property or not, the plaintiffs cannot be affected thereby. A declaration granted by the civil court that Tulsha

(1) (1913) I.L.R., 36 All., 48.

(2) (1922) I.L.R., 44 All., 692.

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was nobody will not be of any use to the plaintiffs in the revenue court. They have to establish in the revenue court that they are the occupancy tenants, before they can compel the zamindar, the present appellant, to recognize them as his tenants. In the circumstances the grant of a relief as to the invalidity of the relinquishment would be in the nature of a *brutum fulmen* and would be a decree which no civil court in the exercise of its discretion will ever grant.

In my opinion the appeal ought to be allowed and the suit of the respondents should be dismissed with costs throughout.

BENNET, J. :—Both the lower courts have held that this suit is cognizable by the civil court. The appellant argues that the suit should have been brought in the revenue court under section 95, Act No. II of 1901, as a suit for a declaration of the name and description of the tenant of the holding and the class to which he belongs.

On the pleadings of the parties the issues naturally arise as to whether at the date of relinquishment the plaintiffs were occupancy tenants or Musammat Tulsha, and whether Musammat Tulsha was entitled to make a deed of relinquishment in favour of the zamindar appellant.

The suit for the plaintiffs was at first for a declaration that the plaintiffs are occupancy tenants, as well as a declaration that the deed of relinquishment was ineffectual against them. Before the written statement was filed the plaintiffs gave up the relief of a declaration that plaintiffs are occupancy tenants, and the suit became one for a declaration only in regard to the deed of relinquishment.

The question of the proper forum for a *declaratory suit in regard to a deed of relinquishment* has arisen in the following rulings, in which there was a suit in the

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revenue courts for ejectment and at the same time a suit for declaration in regard to a deed of relinquishment in the civil courts :—*Suba Bibi v. Raghubir Singh* (1), *Ramdhari Rai v. Ramdhari Rai* (2), *Chhote Lal v. Sheopal Singh* (3), *Jaigopal Narain Singh v. Uman Dat* (4) and *Brij Kumar Lal v. Sheo Kumar* (5).

Bennet, J.

*In these rulings it has been held that the civil court could make a declaratory decree as regards the validity of the relinquishment. In Ram Devi v. Bindesri* (6), Mr. Justice PIGGOTT, held the contrary, and his decision was upheld in Letters Patent Appeal, No. 127 of 1912.

It may be argued that the above five rulings have been wrongly decided and are opposed to the principle underlying the decision in I. L. R. 37 All., 41, because the defendant in the suit for ejectment might have pleaded that the relinquishment was invalid. But such a comment would not apply in the present case. For in the present case there was no suit for ejectment or anything else pending in the revenue court against the plaintiffs, and therefore it was not open to plaintiffs to plead by way of a defence in the revenue court that the relinquishment was invalid. Their position in the revenue court would have had to be that of plaintiffs. There is no section of Act No. II of 1901 which enables a plaintiff in the revenue court to sue for a declaration that a relinquishment is invalid. That is not one of the matters for which a declaration may be granted under section 95, Act II of 1901. At the most it can be said that such a matter could be brought indirectly under that section on a plea that a declaration was desired as to the name and description of the tenant and his class.

The question has also been raised as to whether *after the revenue court has granted a decree of ejectment of a*

(1) (1909) 7 A.L.J., 291.

(2) (1909) 7 A.L.J., 305.

(3) (1910) I.L.R., 33 All., 335.

(4) (1911) 8 A.L.J., 695.

(5) (1915) I.L.R., 37 All., 444.

(6) (1911) 8 A.L.J., 910.

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tenant, that tenant can maintain a civil suit for a declaration that a relinquishment was invalid, and it has been held that he could not maintain such a suit: *Pahalwan Singh v. Satrupa Kuar* (1), *Balwant Singh v. Girdhari Lal* (2) and *Shiva Prakash v. Karna* (3).

CHANDRA J.

These decisions are no authority for the proposition that the present suit does not lie in the civil court, as there is no prior revenue court decree. The basis of these last three rulings was that the decree of the revenue court was binding on the parties and that any decree made by the civil court would be wholly nugatory. The ground for decision in *Ram Dori v. Bindesri* (4), was similar.

In the Full Bench case of *Fatch Singh v. Gopal Narain* (5), the question referred was:—"What course is the civil court to adopt when a suit is filed before it the object of which is to affect the decision of the revenue court in a pending suit within the exclusive jurisdiction of that court?"

The question again was that of a declaratory suit in the civil court in regard to a surrender of his holding by an occupancy tenant who had made a mortgage of his occupancy holding. As stated by LINDSAY, J., at page 92, the difficulty arose because the revenue court was bound to follow the decisions of the Board of Revenue to the effect that such a surrender operates to put an end to the relation of mortgagor and mortgagee, whereas the civil courts hold the contrary. He states:—"When all is said and done, the granting of relief by way of declaration is a matter within the discretion of the civil court, and if it is made to appear that the declaration when granted to the plaintiff will be of no avail to him, that seems to me to be a very good reason for holding

(1) (1905) 2 A.L.J., 471.

(2) (1907) 5 A.L.J., 30.

(3) (1913) I.L.R., 35 All., 164.

(4) (1911) 8 A.L.J., 940.

(5) (1925) I.L.R., 48 All., 88.

that in such a case the court should exercise its discretion against the plaintiff and decline to grant any relief. *This is not to say that a suit for declaration of the nature just mentioned is not entertainable by a civil court. That I think would be going too far.* But it is clear that any civil court is entitled, in the exercise of its discretion, to refuse a declaration of this kind if it is to turn out to be purely nugatory." SULAIMAN, J., stated :—"Where it is clear to the civil court that the declaratory decree would be futile, the simple course would be to refuse to exercise its discretion for granting a declaratory relief. In fact I myself acted on that very ground in the case of *Ganga Chamar v. Bindeshri Rai* (1). *In that case I declined to say that the civil suit was barred by section 167 of the Agra Tenancy Act.*" -

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This Full Bench decision therefore lays down the following propositions— :

(1) That the civil courts have jurisdiction to entertain such a declaratory suit in regard to the surrender of an occupancy holding.

(2) That the civil courts should refuse to grant a declaration (a) where there is a suit pending in a revenue court, and (b) where in that suit the revenue court would be bound to disregard the declaration of the civil court.

In the present case there is no suit pending in the revenue court. And as the surrender is not by an occupancy tenant who had mortgaged his holding, there is nothing which would bind the revenue court to disregard the decision of the civil court. The conditions (a) and (b) do not exist and therefore there is no reason why the civil courts should not exercise their discretion and grant the plaintiffs the declaratory decree.

It has been argued that such a declaration would be of no use to the plaintiffs. This does not appear to be correct. The plaint, in paragraph 7, alleges that the

(1) (1925) I.L.R., 47 All., 904.



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Collector has, on summary inquiry under section 40 of Act No. III of 1901, ordered correction of *khatauni* for this holding (on the deed of relinquishment by Musammat Tulsha). Under section 40 (3) no order under that section bars anyone from establishing his right by suit in the civil or revenue court. If the declaration is granted to the plaintiffs that the deed of relinquishment was not by the occupancy tenant, then the plaintiffs will be able to apply for revision of that order under section 40, and to have their names entered as occupancy tenants. On page 10, line 32, of the paper book it is stated that the revenue court suggested to the plaintiffs that they should have their title adjudicated in the civil court; (vide judgement of the court of first instance). If it be objected that entries are made under section 40 on the basis of possession, then attention may be given to the finding of the lower appellate court on page 15, lines 13 to 18, which is apparently a finding that the plaintiffs are still in cultivating possession, as all that the defendant was able to offer was oral evidence that two of the plots were let to outsiders, and no evidence in regard to who cultivated the remaining 13 plots; and the lower appellate court apparently did not accept the evidence for the defendant on this matter.

It is to be noted that the proceedings under section 40 were not a *suit*, as sub-section (3) shows. The case would be different if there had been a revenue suit decided against the plaintiffs.

The criticism has been made that the ten rulings cited are all rulings in which a mortgagee of an occupancy tenant has challenged a relinquishment made by the occupancy tenant. It was suggested that though an occupancy tenant's mortgagee might come to the civil court, a claimant to the occupancy tenancy might not come to the civil court. But it has not been laid down

in any of the ten rulings that a suit to declare a relinquishment invalid can only be brought in the civil court by a mortgagee. On the contrary, it has been held that the mortgagee is under certain disadvantages in such a suit, owing to the view taken by the Board of Revenue of his rights. It appears that the rulings relate to mortgagees because it is usually in the case of an occupancy tenant who has parted with his possession to a mortgagee that the landholder is able to induce the tenant to surrender his occupancy rights. The present case, where the occupancy tenancy of the joint family was entered in the name of the widow of one of its former members, must be a very unusual case. It appears to have arisen from Durga Prasad, who originally began to cultivate the holding, entering it in the name of his infant son Devi Din, probably under the impression that Devi Din would have less trouble when he would succeed on the death of Durga; but in a few years Devi Din died while still an infant and the revenue authorities erroneously entered the name of the infant widow of Devi Din.

It has been too easily assumed that the plaintiffs could have brought their suit in the revenue court. The learned vakil for the appellant was given an interval to search for any ruling which would show that a suit similar to the present, based on the invalidity of a deed purporting to be a deed of surrender of occupancy rights, had ever been brought in a revenue court under section 95 of Act No. II of 1901 or any other section. He stated that he was unable to find any such ruling.

My learned brother has referred to the following rulings:—*Dori Lal v. Sardar Singh* (1), *Birham Khushal v. Sumera* (2), *Ram Charitra v. Jinsi Ahirin* (3) and *Jagannath v. Balwant Singh* (4).

(1) (1908) 5 A.L.J., 514.

(2) (1913) I.L.R., 35 All., 299.

(3) (1913) I.L.R., 36 All., 48.

(4) (1922) I.L.R., 44 All., 692.

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All of these were suits in which the declaration asked for was one under section 42 of the Specific Relief Act, that the plaintiff had a certain legal character, such as that he was the adopted son of the late occupancy tenant (5 A. L. J., 514), or his legitimate son (I. L. R., 35 All., 299), or legally married wife (I. L. R., 36 All., 48), or that another person was not the adopted son (I. L. R., 44 All., 692).

The proviso to section 42 is :—"Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so."

Under this proviso the plaintiff, if out of possession, is bound to ask for possession. To give possession of an occupancy holding is within the jurisdiction of the revenue, and not the civil, court. And it was precisely on that ground that these suits failed. This is shown in one of these rulings, I. L. R., 35 All., 299, at p. 301 :—  
"Even in the present suit it had to be admitted on behalf of the plaintiff that his suit for possession would not lie in the civil court, and it is said that all he requires and asks for is a declaration that he is the legitimate son of Jhau. *We are not prepared to say that if the plaintiff had come to the civil court for a simple declaration that he was the legitimate son of Jhau, he would not have been entitled to the declaration, provided that he proved his case; but the suit is actually one for possession of an occupancy tenure and is brought against the landlord. For two years after the dismissal of his suit by the Commissioner he did nothing. A suit for possession by a tenant illegally dispossessed has to be brought within six months of the dispossession. Such a suit, if it be now brought by the plaintiff, could not succeed. Therefore, to grant a declaration that he is the legitimate son of Jhau would be of no use to him now. It could not be*

followed up by a suit for possession in the revenue court. In these circumstances, in our opinion, the suit must fail."

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It is also to be noted that in this ruling the plaintiff, before he sued in the civil court, had sued under section 95 of Act No. II of 1901 for a declaration that he was the occupancy tenant of the holding and the zamindar had pleaded that the plaintiff was not the legitimate son of the last holder. The suit was dismissed and the Commissioner upheld the order of dismissal, saying:—"A suit under section 95 of the Tenancy Act is not the way in which to decide a question of legitimacy. The zamindar denies the existence of the tenancy and this is fatal to the suit." This judgement is against the argument of the appellant on both points, for he argued (and my learned brother has accepted the argument on page 3 of his judgement) that section 95 of the Tenancy Act was the proper section under which to decide these questions such as legitimacy or the validity of a deed of relinquishment. The decision of the Commissioner on this point was approved of by this Court on page 301 of I. L. R., 35 All., 299:—"Section 95 of the Tenancy Act is hardly the section under which to proceed." As regards the second point, the appellant argued that it was sufficient for the plaintiffs to claim to be in possession to bring their suit under section 95, even though the zamindar denied their possession. This also is contrary to the judgement of the Commissioner, and in the ruling, on page 301, it is said:—"and the suit brought under that section was rightly dismissed, as the plaintiff was not in possession." Now the present suit and the ten rulings to which I have referred are all suits under section 39 of the Specific Relief Act for a declaration that a written instrument is void. There is no proviso to that section that the plaintiff must sue for any other relief to which he might be entitled. In this respect the section

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differs from section 42, which has such a proviso. A plaintiff, therefore, who is out of possession cannot sue under section 42 in the civil court, because for his possession he must go to the revenue court. But there is no such bar to the suit of a plaintiff under section 39. This appears to be a reason why the four rulings, dealing with suits under section 42, relied on by my learned brother are not rulings which will apply to the present suit under section 39. Even in these four rulings the courts have been careful to say that if a mere declaration is asked it would be granted. I have quoted to that effect from I. L. R., 35 All., at p. 301. The point is further illustrated from I. L. R. 36 All., 48, at p. 51 :—“The case lies in our opinion very near the boundary, and, like the learned Judges who decided the case of *Birham Khushal v. Sumera* (1), *we feel it necessary to guard ourselves against laying down that a suit for declaration of legal status cannot be entertained by a civil court merely because such a suit may be brought in consequence of a dispute which originally arose between landlord and tenant. We can conceive of a plaint, similar to the present but differently drafted, in which a mere declaration as to the existence of a valid marriage might have been sought, and in respect of which it could scarcely have been held that the jurisdiction of the civil court was ousted.*”

The points which differentiate the present case from other cases quoted by appellant are :—

(1) The present plaint (as amended) does not ask for possession, it merely asks for a declaration.

(2) The plaint asks for a declaration under section 39 of the Specific Relief Act in regard to a document and not a declaration about legal status under section 42.

(3) There is no pending suit in the revenue court, or decree.

(1) (1913) I.L.R., 35 All., 299.

(4) The finding of the lower appellate court is that the plaintiffs are in cultivating possession.

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To sum the matter up, it appears to me that everyone has a right to bring a declaratory suit in the civil court in regard to a document, under section 39 of the Specific Relief Act. The granting of a declaration is a matter for the discretion of the civil court. As regards surrenders by occupancy tenants, the civil court will not grant declarations where there are suits pending in the revenue court, in which the revenue court would be bound to disregard the declarations, or where the revenue court has granted a prior decree against the plaintiff. In the present case there is no revenue court decree or pending suit.

No ruling has been shown prescribing any other limitation on the discretion of civil courts in regard to such declarations about documents of surrender of occupancy holdings.

Therefore the present suit is one in which the lower appellate court has correctly granted a declaration.

By THE COURT :—As the Judges composing this Bench differ on a point of law, it is ordered that the following point be referred to a third Judge of the Court, namely, "Whether in the circumstances of the present case, the plaintiffs are entitled to maintain their suit in the civil court."

The matter was then laid before a third Judge, namely SULAIMAN, A. C. J.

SULAIMAN, A. C. J. :—This is an appeal by the zamindar, arising out of a suit brought by two plaintiffs claiming to be occupancy tenants of the defendant No. 2, and asking for a declaration that a certain deed of relinquishment executed by defendant No. 1, a widow, in favour of the zamindar is null and void and not binding on them.

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The original plaint included an express relief for a declaration that the plaintiffs are the occupancy tenants of the holding, and also, in the alternative, one for possession. The latter was deleted and the former was withdrawn by the vakil subsequent to the filing of the plaint. The only relief that remained was that the defendant No. 1, Musammatt Tulsha, had no concern with the holding, and that the relinquishment by her was fictitious, fraudulent and collusive, and was ineffectual against the plaintiffs.

Now the plaintiffs are not entitled to a declaration that a document executed by a third party is null and void, or that she had no right to execute it, without establishing that they themselves are the tenants of the land, and that a cloud is cast on their title on account of the deed. Thus, even though the express reliefs for a declaration of right to the tenancy and for possession have now been deleted from the plaint, there can be no doubt that the sole object of the avoidance of the deed of relinquishment is to establish the plaintiffs' right to the tenancy. The court cannot grant the declaration sought for without deciding the question of the disputed tenancy as against the contesting zamindar.

A very large number of cases are referred to in the judgements of my learned brothers, and a good many more have been cited at the Bar by Mr. *Binod Bihari Lal*, who has very fairly put all the available leading cases before me, because the respondents are not represented. It is not necessary for me to refer to all these rulings, because in my opinion a very large number of them are not really relevant for the purposes of this appeal. These rulings can be classified into six groups.

The first and the largest group of cases is where suits were instituted in a civil court by mortgagees of tenancies. According to the view which has prevailed in this

Court a mortgagee of a tenancy is not a tenant of the landlord, and no relation of landlord and tenant exists between these two. In these circumstances it is obvious that the only forum to which an aggrieved mortgagee can have recourse is that of the civil court. According to the view prevailing in this Court such a mortgagee cannot at all maintain a suit in the revenue court under the Tenancy Act. Rulings of this class are therefore not relevant.

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The second group of cases is of those where, previous to the institution of the suit, revenue court decrees had been passed against the plaintiff and were operative. In such cases civil courts have invariably declined to re-adjudicate upon the rights of the parties, as the effect would be to nullify the decree of the revenue court which was competent to decide the matter.

The third group of cases is of those where, although no final revenue court decree had been obtained, a suit in a revenue court, raising substantially the same point, was pending in the revenue court, which had jurisdiction to try that question of dispute. In such cases the High Court very often declined to exercise its discretion to grant the declaration sought for, on the ground that the decree would be futile as the revenue court might not act upon it.

The fourth group of cases is of those in which the zamindar was not a party at all, but two rival claimants to a tenancy were litigating in a civil court. Admittedly no relation of landlord and tenant exists between such parties, and such suits are obviously cognizable by a civil court.

The fifth group of cases is of those where the plaintiff alleges that he is either the sole or the joint tenant of a tenancy, and does not admit that the defendant is his landlord. In such cases, even when the defendant



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pleaded that he was the zamindar, the civil court has been held to have jurisdiction to try them. Such cases also are distinguishable.

The sixth group of cases is of those where suits are brought, not by mortgagees, but by tenants, when neither a previous revenue court decree exists, nor is there any suit pending in a revenue court, and the landlord is among the defendants and the plaintiff admits that he is the landlord. In my opinion, it is rulings only in such cases that are relevant for the purposes of the present appeal.

Before referring to them I would examine the provisions of the Tenancy Act itself. Section 167 of Act II of 1901 consists of two parts. The first part directs that "all suits and applications of the *nature specified* in the fourth schedule shall be heard and determined by the revenue courts." This apparently gives jurisdiction to the revenue courts to try, not only suits and applications mentioned in the fourth schedule, but also such as are of the nature specified therein. The second portion of it says that "no court other than a revenue court shall take cognizance of any dispute or matter in respect of which any such suit or application might be brought or made." This confers exclusive jurisdiction on the revenue courts, and therefore all courts other than revenue courts must refrain from trying such questions. It is noteworthy that the expression used is not merely "suits and applications," but "any dispute or matter in respect of which any suit or application might be brought or made." The section has been obviously made very comprehensive in order to include all cases in which disputes arise in respect of a matter which can be disposed of by the revenue courts. The object of the section, to my mind, clearly is that all suits, no matter in what way plaints are framed, should be instituted in a revenue

court if the dispute is such as can be effectively disposed of by that court. In this view there can be no doubt that the true test to apply in all such cases would be to ask the question "whether the dispute, which arises in the present case, is one in respect of which any suit or application *could* have been brought in the revenue court."

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In a case like the present, where the main object of the plaintiffs is to establish their right to the tenancy as against the zamindar and it is only on the establishment of such a right that the declaration as to the non-binding character of the relinquishment by the *pro formâ* defendants can be granted, it is clear that in a properly framed suit in a revenue court the same substantial relief can be obtained from it. Under section 95 at any time during the continuance of a tenancy a tenant may sue for a declaration as to the name and description of the tenant of the holding. On the plaintiffs' own showing the tenancy continues and the relation of landlord and tenant exists between them and the zamindar, the only dispute being who is the tenant. To such a suit in a revenue court the widow could very easily have been impleaded as a *pro formâ* defendant. There is nothing in the Tenancy Act which prevents such a *pro formâ* defendant from being impleaded. Clause (a) obviously covers cases where on the death of a tenant there is a dispute among more persons than one as to who should succeed him. The present plaintiffs could therefore very easily, and indeed more appropriately, have sought their relief in a revenue court without coming to the civil court at all. I am therefore clearly of opinion that the jurisdiction of the civil court to grant such a relief is barred by section 167 of the Act.

The following cases support my view, and I think that out of all the cases cited before me they only are relevant.

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In the case of *Dori Lal v. Sardar Singh* (1), a tenant's suit for a declaration that he was in joint cultivation with, and the adopted son of, a deceased tenant by right of survivorship, against the zamindar was held not to be maintainable in a civil court. It was clearly laid down there that a suit of that kind would fall under section 95 of the Tenancy Act.

In the case of *Birham Khushal v. Sumera* (2), a tenant's suit filed against the zamindar in the civil court, asking to have it declared that he was the son and lawful heir of the late tenant, and for possession of the occupancy holding, was thrown out on the ground that he ought to have brought his suit within six months in the revenue court. The substantial relief claimed in that suit, however, was one for possession pure and simple, and the case is therefore distinguishable. It is unnecessary to consider in the present case whether an heir to a deceased tenant can be deemed to be in constructive possession of the holding, so that his failure to obtain actual possession amounts to a dispossession or ejectment within the meaning of section 79 of the Act.

The case of *Badri Kasaundhan v. Sarju Misr* (3) was also a suit for possession in a civil court against the zamindar, and was dismissed on similar grounds.

In the case of *Ram Charitra v. Jinsi Ahirin* (4), a suit by a woman, alleging herself to have been legally married to a deceased tenant and being the rightful heir to the tenancy as his widow, brought in the civil court against the zamindar was held to be barred by section 167, as the plaintiff's remedy was under section 95 of the Tenancy Act.

Lastly, in the case of *Jagannath v. Balwant Singh* (5), a suit by a zamindar for a declaration of the

(1) (1903) 5 A.L.J., 514.

(2) (1913) I.L.R., 35 All., 299.

(3) (1913) I.L.R., 36 All., 55.

(4) (1913) I.L.R., 36 All., 48.

(5) (1922) I.L.R., 44 All., 692.

invalidity of an alleged adoption, set up by certain persons who were claiming to be the heirs to the tenancy of a deceased tenant, was held not to be cognizable by the civil court, as the proper remedy was a suit under section 95 of the Tenancy Act.

It will be noticed that in the cases noted above the plaintiff admitted that the relation of landlord and tenant subsisted between the parties and that the tenancy was still continuing. The defendant landholder was a party and was denying the plaintiff's title to the tenancy. The last-mentioned case was a converse case. But in all the cases the substantial question in dispute was the right to the tenancy and arose as between the tenant and the landholder. A declaration of that right could have been obtained in a revenue court. It was on this ground that it was held that the civil court's jurisdiction was barred.

It is suggested in the judgement of BENNET, J., that the District Judge has found that it is probable that most of the plots were cultivated by or on behalf of other members as alleged by the plaintiffs appellants. If it is a fact that the plaintiffs are in possession of these plots, they cannot be seriously prejudiced by the dismissal of the present suit on the mere ground of want of jurisdiction. Whenever any attempt is made by the zamindar to eject them, or a dispute is raised in the revenue court as regards their right to the tenancy, it will be open to them to reopen the question of the validity of the surrender by the widow.

I therefore agree with MUKERJI, J., and hold that the appeal ought to be allowed. Let this opinion be sent to the Bench hearing the appeal.

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## FULL BENCH.

*Before Mr. Justice Sulaiman, Acting Chief Justice.*

*Mr. Justice Mukerji and Mr. Justice Boys.*

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JAGDISH PRASAD AND OTHERS (PLAINTIFFS) *v.* HOSH-YAR SINGH AND ANOTHER (DEFENDANTS).\*

*Hindu law—Joint family property—Alienation by father—Legal necessity—Burden of proof—Suit by sons before property is sold in execution of mortgage decree obtained against father—Sons' failure to prove immorality of debt immaterial.*

In a joint Hindu family governed by the Mitakshara, consisting of a father and his sons, the father made a mortgage of joint family property. The mortgagee sued on the mortgage, without impleading the sons, and obtained a decree for sale. After the decree, but before the sale could take place, the sons brought a suit against the mortgagee, challenging the validity of the mortgage. The sons failed to establish that the debt was tainted with immorality and the mortgagee failed to establish legal necessity. There was no question of an antecedent debt.

*Held* that, in these circumstances, the mortgagee having failed to establish legal necessity for the loan, the sons' suit must succeed although they had failed to prove that the debt was of an immoral character. The case was governed by the third, and not by the second, of the five propositions of Hindu law laid down by the Privy Council in *Brij Narain v. Mangal Prasad* (1).

*Per* MUKERJI and BOYS, JJ.:—The second proposition did not apply, because the word "debt" contained in that proposition did not contemplate a mortgage debt but only an unsecured debt.

*Per* SULAIMAN, A. C. J.:—The word "debt" in the second proposition included a mortgage debt, but that proposition did not apply to this case as no auction sale had taken place and the property had not yet passed out of the family.

\*Second Appeal No. 1884 of 1925, from a decree of P. C. Plowden, Additional District Judge of Meerut, dated the 20th of August, 1925, confirming a decree of P. C. Mogha, Subordinate Judge of Meerut, dated the 25th of May, 1925.

(1) (1923) I.L.R., 46 All., 95.

*Brij Narain v. Mangal Prasad* (1), *Sahu Ram Chandra v. Bhup Singh* (2), *Bhagbut Pershad Singh v. Girja Koer* (3), *Suraj Bansi Koer v. Sheo Persad Singh* (4), *Gauri Shankar v. Jang Bahadur* (5), *Gajadhar Pande v. Jadubir Pande* (6), *Nanomi Babuasin v. Modhun Mohun* (7), *Chandradeo Singh v. Mata Prasad* (8), *Lal Singh v. Jagraj Singh* (9), and *Nand Lal v. Umrai* (10), referred to.

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THE facts of the case may be briefly stated as follows:—One Chandra Kishore executed two simple mortgages, in March and June, 1919, of joint ancestral property belonging to himself and his four sons, who formed a joint family with him. He alleged that the property belonged to him and did not profess to act as manager of the joint family. The mortgagee obtained a decree, in May, 1922, for sale on foot of the two mortgages, without impleading the sons in his suit. On the day previous to that fixed for sale of the property in execution of the decree the sons sued the mortgagee decree-holder for a declaration that the property was not liable to be sold in execution of the decree. They pleaded that there was no legal necessity for the debts and that the debts were contracted for immoral purposes. The defendant pleaded that the mortgages had been executed for legal necessity. The findings were that the plaintiffs had failed to prove the immoral character of the debts, and that the defendant had not established that the mortgages were supported by legal necessity. There was no question raised that these loans had been taken to pay off any antecedent debt. Both the lower courts, holding that the plaintiffs could not succeed unless they proved that the debts were tainted with immorality, dismissed

(1) (1923) I.L.R., 46 All., 95.

(2) (1917) I.L.R., 39 All., 437.

(3) (1888) I.L.R., 15 Cal., 717.

(4) (1879) I.L.R., 5 Cal., 148.

(5) (1924) 27 Oudh Cases, 124.

(6) (1924) I.L.R., 47 All., 122.

(7) (1885) I.L.R., 13 Cal., 21.

(8) (1909) I.L.R., 31 All., 176.

(9) (1927) I.L.R., 50 All., 546.

(10) (1926) 29 Oudh Cases, 260.

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the suit. The plaintiffs appealed to the High Court, and the case was referred to a Bench of three Judges.

Pandit Narmadeshwar Prasad Upadhiya, Munshi Girdhari Lal Agarwala and Babu J. S. Gupta, for the appellants.

Babu Peary Lal Banerji, for the respondents.

SULAIMAN, A. C. J. :—In the present case the sons' suit was filed after the mortgagee had obtained a mortgage decree against the father without impleading the sons, but before the mortgage property was actually put up for sale at auction.

I agree in the final conclusion arrived at by my learned brothers that the sons can obtain a declaration avoiding the mortgage if the mortgagee fails in establishing legal necessity for the advance, even though the sons themselves fail to show that the debt was tainted with immorality. My reasons, however, are slightly different.

I agree that the case of *Brij Narain v. Mangal Prasad* (1) must be taken to summarize all the propositions which follow as a result of the previous authorities, and should be deemed to include all the observations made in the case of *Sahu Ram Chandra v. Bhup Singh* (2) which were supported by authority. It is clear from the remark at pages 102-3 in the case of *Brij Narain* that the case of *Sahu Ram Chandra* must not be taken to decide more than what was necessary for the judgement.

In this view it is unnecessary for me to examine the passage in the case of *Sahu Ram Chandra* relied upon by the learned advocate for the defendant with reference to its context. The present case must be governed by one or other of the five propositions laid down in *Brij Narain's* case.

Inasmuch as the present suit was instituted before the auction sale could take place, I agree that the case is not governed by proposition No. 2 and therefore falls under proposition No. 3. But I have great difficulty in

(1) (1923) I.L.R., 46 All., 95.

(2) (1917) I.L.R., 39 All., 437.

holding that the word "debt" used in proposition No. 2 means "simple money debt" or "debt other than a mortgage debt."

In the first place *Brij Narain's* case was one in which a mortgage decree had actually been obtained by the mortgagee. The debt which their Lordships had to consider was a mortgage debt. One would therefore expect that wherever there was a clear distinction between the rule governing a "mortgage debt" as distinct from a "simple money debt," their Lordships would be specific in making their meaning clear. Throughout the judgment at several places their Lordships describe a "mortgage debt" as a "debt." While referring to *Sahu Ram Chandra's* case, which was one of a mortgage debt, their Lordships repeatedly call it a "debt." While explaining what was meant by an antecedent debt their Lordships draw no distinction between a "mortgage debt" and a "simple money debt." Can it for a moment be suggested that a "mortgage debt" is not a "debt", or that the word "debt" by itself is not comprehensive enough to include a "mortgage debt?"

Their Lordships also relied on the authority in the case of *Bhagbut Pershad Singh v. Girja Koer* (1). That also was a case of a mortgage debt, and their Lordships referred to the loan as a "debt." I think it unnecessary to quote more passages from the judgment, for I am convinced that throughout the judgment their Lordships used the word "debt" as comprehensive enough to include both a "mortgage debt" and a "simple money debt." I therefore see no justification for introducing the words "other than a mortgage debt" after the word "debt" in proposition No. 2 in order to give it a meaning.

It cannot be denied for a moment that the same word "debt", when used in propositions Nos. 3 and 4, includes

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(1) (1888) I.L.R., 15 Cal., 717.



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a "mortgage debt." Although, therefore, I find it very difficult to give a narrow and limited meaning to the word "debt" in proposition No. 2, I hold that that proposition is not applicable to the present case, because no auction sale has taken place yet.

*Sulaiman,*  
A. C. J.

I am inclined to interpret the expression "lay the estate open to be taken in execution proceedings upon a decree for payment of that debt" as the equivalent of "make it liable to be sold at auction in execution of the decree," which to my mind means that as soon as the property has been sold at auction the transaction cannot be impeached without showing immorality. The clause does not necessarily mean that after the decree and before the sale the sons cannot, by obtaining a declaratory decree in a separate suit, say that the transaction is not binding on them, and thus prevent the sale. That the expression does not mean that the passing of the decree itself prevents the sons from challenging the debt, will be obvious if we apply proposition No. 2 to the case of a simple money debt. Surely the debt creates no charge on the estate. The decree on the foot of such a simple money debt also creates no lien or charge upon the estate. So long as the property has not been attached in execution of such a simple money decree, the family is at liberty to transfer it so as to place it out of the reach of the creditor. The decree by itself has no special efficacy. The position of the creditor remains the same as it was when the debt was contracted, or when the suit was instituted. The liability of the estate to pay off this debt is also not altered materially by the passing of a simple money decree. Such being the case, it cannot be said that the mere passing of the decree lays the estate open to be seized by the decree holder in the literal sense. The expression quoted by me above is a paraphrase of another expression used by their Lordships at page 101,—"It may become liable by being taken in execution on the

back of a decree obtained against the father''—which means that the estate can be purchased in execution of such a decree.

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It may be that the logical result of such an interpretation is that the right to impeach an auction sale on the ground of want of legal necessity is taken away even if the sale takes place in execution of a mortgage decree, but such a result is not necessarily startling. It is in accordance with at least two previous cases decided by their Lordships of the Privy Council: *Suraj Bunsî Koer v. Sheo Persad Singh* (1) and *Bhagbut Pershad Singh v. Girja Koer* (2). Both were cases of auction sales in execution of mortgage decrees. The judgements in both of these cases show that their Lordships did not draw any distinction between an auction purchase in execution of a simple money decree and that in execution of a mortgage decree. Several previous cases dealing with auction sales in execution of simple money decrees were referred to and applied to the case before their Lordships. There would have been no necessity to refer to them if they were inapplicable. Without drawing any distinction, their Lordships laid down the general proposition that after sales in execution of a decree for the father's debt the sons cannot recover the property without showing immorality or illegality to the knowledge of the purchasers.

No doubt the original basis of the doctrine appears to have been the protection of third parties, but in view of a series of pronouncements of the Privy Council it may now have become settled that after an auction sale the son can impeach the transfer only on the ground of immorality.

Even in cases of simple money decrees innocent strangers need not necessarily come in, for the creditor himself, who may have known that there was no legal

(1) (1879) I.L.R., 5 Cal., 148.

(2) (1888) I.L.R., 15 Cal., 717.

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necessity for his debt, may purchase the property himself, but the rule will still apply.

On the other hand the mere fact that a mortgagee decree-holder has himself purchased the property does not necessarily show that he is not a *bonâ fide* purchaser. He may be an heir of the original mortgagee, he may be an alienee of the mortgagee rights, or he may have acquired the mortgagee rights at an auction sale, and in such cases he may have no knowledge whatsoever that the mortgage transaction was defective, or that it was going to be attacked by the sons. At the time when he makes the auction purchase he may be acting innocently, and may honestly take it for granted that the decree is good and binding on the whole family.

When authorities have laid down a rule, it is not always necessary to try to discover the original basis of it. If one were asked to give an explanation why an auction sale in execution of a mortgage decree should prevent the sons from challenging it except for immorality, one can certainly find a reason for it. Once a decree has been obtained, or for the matter of that a debt exists, unless it is immoral the father can voluntarily sell the family property in payment of such debt and the sons cannot dispute such a sale without showing immorality or illegality. What can be done voluntarily by the father himself may also be done compulsorily by the court. If the father can satisfy his own previous debt by alienating such property, why cannot a court of law order his property to be sold in satisfaction of such debt? After all, an auction sale is merely an involuntary transfer of property in satisfaction of his debt and the principle which governs a voluntary transfer to pay off such debt may equally be applicable to an involuntary transfer in payment of the same debt, brought about through a court sale.

In the present case only a decree has been passed on the basis of the mortgage debt. The decree is a necessary result of the execution of the mortgage. When the sons were not impleaded in the suit, the mortgagor himself could not plead that he had no authority to make the mortgage. The mere fact that a decree has been obtained behind the back of the sons has not improved the position of the mortgagee. The auction sale has not yet taken place. The property has therefore not yet passed out of the family. It is still in the possession of the family.

In these circumstances my answer to the question referred is that the sons need not prove the immoral character of the debt if the mortgagee fails to establish legal necessity for the loan.

MUKERJI, J. :—This appeal, which has been referred for disposal to a Bench of three Judges, arises out of the following facts. The plaintiffs, who are the appellants before this Court, are the sons of defendant No. 2, Chandra Kishore. Chandra Kishore executed two simple mortgages over a part of what now must be taken to have been joint ancestral property belonging to himself and his sons, the plaintiffs, in favour of the defendant No. 1, Hoshyar Singh. Hoshyar Singh obtained a decree for sale on foot of the two mortgages. Thereupon the plaintiffs instituted the suit, out of which this appeal has arisen, to obtain a declaration that the property mortgaged, being joint Hindu family property, is not liable to be sold in satisfaction of the decree No. 44 of 1922, passed by the court of the Subordinate Judge of Muzaffarnagar in favour of Hoshyar Singh and against Chandra Kishore. It will appear from the foregoing statement of facts that the plaintiffs were no parties to the decree.

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The plaintiffs in support of their case alleged that their father Hoshyar Singh contracted the debts for immoral purposes. The defendant pleaded, among other matters, that the mortgages had been executed for legal necessity.

*Mukerji, J.*

The court of first instance found that while the plaintiffs had failed to prove that the mortgages were tainted with immorality, Hoshyar Singh, in his turn, had failed to prove that the mortgages were executed for family necessity. Being of opinion, in view of an Oudh case, *Gauri Shankar v. Jang Bahadur* (1), that the plaintiffs could not succeed in their suit for a declaration without proving that the mortgages were tainted with immorality, the learned Subordinate Judge dismissed the suit. On appeal by the plaintiffs the learned Judge affirmed the finding of fact arrived at by the learned Subordinate Judge that the plaintiffs had failed to prove that the mortgages were raised for immoral purposes. It appears from the judgement that Hoshyar Singh did not try to support the decree in his favour, in the lower appellate court, by showing on the evidence that the mortgages were supported by legal necessity. The learned Judge, accepting what he thought was a necessary corollary of a certain case decided in this Court, agreed with the learned Subordinate Judge that the plaintiffs could succeed only on proving their allegation as to the father's immorality with reference to the mortgages in question. He accordingly dismissed the appeal.

The case relied on by the District Judge was that of *Gajadhar Pande v. Jadubir Pande* (2). The point that had to be decided in that case was slightly different, though a corollary may certainly be drawn from that decision, in support of the learned District Judge's view. The case aforesaid was one in which the property had

(1) (1924) 27 Oudh Cases, 124; 79 (2) (1924) I.L.R., 47 All., 122.  
Indian Cases, 1008.

already passed out of the family in execution of the mortgage decree and had been purchased by the mortgagee himself and sold by him to a third party. A Bench of this Court, of which I was a member, held that the case was governed by the second proposition, out of the five, laid down by their Lordships of the Privy Council in the case of *Brij Narain v. Mangal Prasad* (1).

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Since the decision of that case, the case of *Brij Narain* has been considered in this Court and it was further considered in the arguments before us in this very case. Having regard to all the arguments addressed to us, I fear that the opinion previously expressed by me in the case in I. L. R., 47 All., 122 must be treated by me as erroneous. Their Lordships of the Privy Council took an opportunity in the case of *Brij Narain* to overrule, except on the point directly decided, a previous decision of the Board viz., *Sahu Ram Chandra's* case (2), and laid down five propositions of Hindu law for the guidance of the courts. As remarked by their Lordships of the Privy Council in a much earlier case, *Nanomi Babuasin v. Modhun Mohun* (3), the cases relating to the liability of sons for their father's debts contracted with or without the security of the family property, decided both in India and by the Board could not all be very well reconciled. Their Lordships found that some of the observations made in the case of *Sahu Ram Chandra* could not command their Lordships' approval. Their Lordships, therefore, we may take it, were anxious to lay down the five propositions of law with the idea that those propositions would be taken as the final statement of the law on the subject and as no longer open to discussion. The Board which heard *Brij Narain's* case was described by their Lordships themselves as a "Full Board." I am therefore of opinion

(1) (1923) I.L.R., 46 All., 95.

(2) (1917) I.L.R., 39 All., 437.

(3) (1885) I.L.R., 13 Cal., 21.

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that we should not go to any earlier decisions in order to find out what is the law governing the relations of sons, fathers and creditors, so far, at least, as these propositions are found governing a case. For example, their Lordships did not say anything about the rights of an auction purchaser at a court sale and his rights will have to be found from earlier decisions, unless we have some guide in the five propositions applicable to the particular case that may arise for decision.

The actual facts that were before their Lordships in *Brij Narain's* case were these. A father of a joint Hindu family borrowed money in order to pay off two earlier mortgages executed by himself. When the loan was not repaid, the creditor sued the father and his sons and obtained an *ex parte* decree. The sons were not properly represented in the suit. They then brought the suit, which went up in appeal before their Lordships of the Privy Council, to obtain a declaration that the decree passed against the father and themselves was not binding on them. The suit succeeded in the court of first instance and it also succeeded in this Court. In this Court an inquiry was ordered as to whether the two previous mortgages paid off would support the subsequent mortgage in favour of the principal defendant, the creditor, having regard to the observations of their Lordships of the Privy Council in *Sahu Ram Chandra's* case, namely, that an antecedent debt, to be good, must have been incurred wholly independently of the family property. As the findings were against the creditor, the appeal was dismissed. Then the matter went before their Lordships of the Privy Council. Their Lordships mentioned, in the course of the judgement, that there were two conflicting principles of Hindu law. One was that a father, as a member of the joint Hindu family, could not alienate and therefore mortgage the

joint Hindu family property without legal necessity. The other proposition of law was that it was the pious duty of a son to pay his father's debt and that the whole of the joint family property could be taken in execution by a creditor in order to realize the father's debt. Their Lordships, at page 102 of the report, remarked:—"It is probably bootless to speculate as to how these seemingly conflicting principles were allowed to develop. . . . For after all, if looked at straight in the face, what position could be more anomalous than this? A father who is manager, borrows a like sum from A and B. To A he gives a mortgage on the family estate, containing a personal covenant. To B he gives a simple acknowledgment of loan. B sues and gets a decree; on this decree execution can follow and the estate can be taken. A, suing upon his mortgage, cannot recover. It seems to have been felt that if the debt for which a mortgage was given was in any proper sense antecedent, then it, so to speak, escaped the direct infringement of the principle that the father manager could not burden the estate except for necessity." Having made these remarks, their Lordships further remarked that there were some observations in *Sahu Ram Chandra's* case which were not necessary for their Lordships to make and with which the learned Judges of the Full Board thought their Lordships could not agree. Then their Lordships proceeded to lay down the five propositions of law to be found at page 104 of the report.

In the light of what preceded the laying down of these propositions, I proceed to examine them. The first proposition is:—"The managing co-parcener of a joint undivided estate cannot alienate or burden the estate *qua* manager except for purposes of necessity."

It will be noticed that their Lordships used the expression "burden the estate" in the sense of mortgaging the estate. They have used the same expression in

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the last sentence of the long quotation made by me from page 102 above. By the first proposition, therefore, their Lordships meant that a manager, which term will include a father with sons, has no power either to make a sale or gift of property or of even mortgaging the same for raising a loan, except for purposes of necessity. It would follow from this that if the father raised a loan on the security of the family property, that security could not be enforced against the family estate.

The third proposition is as follows:—(I am leaving for the present out of consideration the second proposition, which is the important one in the present case)—“If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind the estate.” Here again, their Lordships make it clear that by the use of the expression “burden the estate,” their Lordships meant a mortgage and never had a simple money debt in their mind. The rule laid down is that if the manager of the family estate happens to be the father, and there is no family necessity, the case of which has been provided for by proposition No. 1, the mortgage, to be enforceable, must be a mortgage which was raised to discharge an antecedent debt. Here again, their Lordships make it clear that a case of a mortgage can be supported by the creditor on two grounds; one is, generally, that the manager can encumber the estate by way of mortgage for the purpose of necessity; secondly, that the manager, being a father, paid with the money raised his own or an ancestor's existing debts.

The fourth proposition concerns itself with the definition and explanation of an antecedent debt and we need not consider it.

The fifth proposition is also not important for our purposes, except in so far as it will help us to understand the right meaning of proposition No. 2. I shall have to consider the language of the fifth proposition after I have discussed the proposition No. 2.

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The proposition No. 2 runs as follows:—“If he (the manager) is the father and the reversionaries are the sons he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt.” The question is whether the debt which is mentioned in this proposition No. 2 also includes a mortgage debt. Their Lordships lay down by this proposition No. 2 that in the case of the manager of the family being the father and the rest of the members being his sons, the father, if he incurs a debt which is not tainted with immorality, incurs the risk of the creditor recovering the debt from the entire estate by way of execution of a decree obtained on foot of the debt. As I have said above, the question is whether the word debt in proposition No. 2 includes a mortgage debt. If their Lordships were dealing with a mortgage debt it was not necessary for them to deal with it in propositions 1 and 3. I will refer to the quotation made by me from the observations of their Lordships at page 102. Their Lordships give the illustration of the same father borrowing equal sums of money from two different persons. To one he gave a mortgage over the family property and to the other he gave a simple acknowledgment or a simple money bond. Their Lordships point out that while the secured creditor is unable under the Hindu law to recover his money by the process of law, the unsecured creditor has the advantage of realizing his money from the entire estate. In my opinion, in the proposition No. 2 their Lordships were dealing with

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J. the case of an unsecured creditor and were not contemplating the case of a secured creditor. It is, therefore, not right to say that as soon as a mortgagee obtains his decree against the father he comes within the proposition No. 2 and is entitled to sell the mortgaged portion of the family property (or the entire family property if the whole has been mortgaged) because it is the pious duty of the son to pay.

The fact that their Lordships, by using the expression "by incurring debt" in proposition No. 2, were referring merely to a simple unsecured debt, will be clear from an examination of the language of proposition No. 5. Proposition No. 5 runs as follows:—"There is no rule that this result is affected by the question whether the father, who contracted the debt or burdens the estate, is alive or dead." In this proposition No. 5 their Lordships used the expressions "contracted the debt" and "burdens the estate." Evidently the contracting of a debt was not meant to imply the same thing as the burdening of the estate. By the word "who contracted the debt" their Lordships meant 'who incurred a debt without the security of the family property.' By the expression, "who burdens the estate," their Lordships meant a father who created a mortgage over the estate. I am satisfied, therefore, that the proposition No. 2 applies to the case of an unsecured debt of the father and not to a secured debt.

The controversy in the appeal before us is this. It is urged on behalf of the creditor respondent, Hoshvar Singh, that because he has obtained a mortgage decree he can proceed to sell the property outright and the sons, the plaintiffs, cannot stop him from selling the property unless and until they can prove that the mortgage was contracted for immoral purposes. He argues that on the finding of the court below, namely that the debt was

not tainted with immorality, he, Hōshyar Singh, ought to succeed. For the sons it is argued that proposition No. 2 has no application; that propositions Nos. 1 and 3 alone apply to the case of the creditor, and that as there is no legal necessity and as the mortgage money did not go to pay off any antecedent debt, the mortgage is bad and is unenforceable. To my mind, the propositions Nos. 1 and 3 are applicable to this case and proposition No. 2 does not apply to the case.

In the result I would allow the appeal, set aside the decrees of the courts below and grant a declaration to the plaintiffs against the defendant Hoshyar Singh that the property mortgaged is not liable to be sold in execution of the decree obtained by him.

Boys, J. :—Chand Kishore, the father in a joint Hindu family consisting of himself and four sons, executed two mortgages, on the 31st of March 1919, and the 8th of June, 1919, in favour of Hoshyar Singh, both mortgages being for cash paid before the registrar, and in both mortgages alleging that the property belonged to him personally and making no suggestion that he was mortgaging the property as property of the joint family and in a representative capacity.

Therefore, admittedly no question arises as to there being any antecedent debt which might validate the mortgage as of joint family property, and no question arises of the father having purported to act in a representative capacity.

Suit No. 44 of 1922 was brought by the mortgagee Hoshyar against Chand Kishore, the father, without impleading the sons. In May, 1922, the mortgagee got a decree and the 20th of November, 1924, was eventually fixed for sale. In the meantime, one day before the date fixed for sale, on the 19th of November, 1924,

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the present suit No. 307 of 1924 was filed by the sons against the mortgagee and their father. In their plaint the sons pleaded (1) that there was no legal necessity, (2) that their father Chand Kishore was of immoral habits, and (3) that the property was joint family and ancestral property. The defendants pleaded (1) legal necessity, (2) that the father Chand Kishore was not of immoral habits and (3) that the property was the personal property of Chand Kishore. As to the third plea, however, they eventually admitted that the property was of the joint family and ancestral. On the 7th of March, 1925, an issue was framed as to legal necessity. On the 8th of May, 1925, the trial court, acceding to the contention for the defendant, held that it had been wrong in framing this issue and changed it to an issue, "whether Chand Kishore's immoral character had been proved," throwing the burden on the plaintiffs.

The trial court held that the plaintiffs had failed to prove immorality, and a phrase in its judgement (page 10, line 38) rather suggests that it was of opinion also that there was no legal necessity; but finding that the plaintiffs had failed to discharge the onus which lay on them of proving that the debts were immoral, it dismissed the suit. It held that if the creditor had been suing for the enforcement of his mortgage against minor sons he could not have got a decree unless he proved legal necessity; but that after a decree against the father had been passed the debt no longer remained a mortgage debt but it became a judgement debt, which like any other debt the sons were bound to pay, unless (semble) they could prove the immorality. It relied on *Gauri Shankar v. Jang Bahadur*. (1).

The lower appellate court agreed with the trial court that the sons had failed to prove the immoral character of their father, though he had shamelessly

(1) (1924) 27 Oudh Cases, 124; 79 Indian Cases, 1008.

endeavoured to support his sons' case by swearing to his own immorality. It held that the burden of proof had been rightly laid on the sons to prove the immorality or unlawfulness of the origin of the debt; and referred to *Gajadhar Pande v. Jadubir Pande* (1), and remarked that there could be no further doubt on this point after the latest Privy Council decision, by which reference, to doubt, was meant the case of *Brij Narain v. Mangal Prasad* (2).

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The case came in second appeal before a Division Bench of this Court, by which it has been referred to the Full Bench. Their Lordships of the Division Bench, after remarking that "it should be noted that the property is still in possession of the family and has not passed out of it", said :—"The important question which we are called upon to decide is whether the sons must prove the immoral character of the debt only in a case in which the property has passed out of the family or whether it is equally incumbent upon them to do so where a decree for sale has been passed but the property is still in possession of the family."

They referred to the case of *Lal Singh v. Jagraj Singh* (3), in which two learned Judges of this Court differed, one holding that it is only when property has passed out of the family that the sons must prove the immoral origin of the debt; the other agreeing with the view consistently taken in the Oudh Court (cf. *Nand Lal v. Umrai* (4), that as soon as a decree has been passed the burden lies on the sons to prove the immoral origin of the debt.

Before attempting an answer to the question put to us I will consider in some detail the cases of *Sahu Ram Chandra v. Bhup Singh* (5) and *Brij Narain v. Mangal*

(1) (1924) I.L.R., 47 All., 122.

(2) (1923) I.L.R., 46 All., 95.

(3) (1927) I.L.R., 50 All., 546.

(4) (1926) 29 Oudh Cases, 260.

(5) (1917) I.L.R., 39 All., 437.

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*Prasad* (1). My apology for making a lengthy reference to and comparison of two such well-known cases must rest on the necessity for an exact appreciation of what was laid down in these two cases and of the extent to which any proposition to be found in the former, whether necessary for the decision or as *obiter dictum*, holds good in view of the pronouncements in the latter.

In *Sahu Ram Chandra's* case a father, Bhup Singh, who was joint with his sons and grandsons, executed three mortgages, all covering the same property, which included some of his own property and some belonging to the joint family.

Of the first of these mortgages nothing further is heard. The second mortgage was of date the 6th of January, 1883, in favour of Bhagirath, for Rs. 200 "to meet his necessity." The third mortgage was of the 7th of January, 1884, in favour of Sahu Ram Chandra. Sahu Ram Chandra sued on his mortgage and got a decree subject to the incumbrance in favour of Bhagirath. He paid off Bhagirath and so acquired his rights, and at the ensuing sale he himself purchased.

On the 27th of July, 1910, by which time the debt to Bhagirath as a simple debt was long ago barred, Sahu Ram Chandra sued on the mortgage in favour of Bhagirath, making the father Bhup Singh, his sons and grandsons and certain transferees parties. Both courts dismissed the suit, holding that the plaintiff had failed to prove legal necessity; relying on *Chandradeo's* case (2).

Their Lordships of the Privy Council examined the general law and stated it as follows: After stating the general principle that joint family property cannot be the subject of a gift, sale or mortgage by one coparcener except with the consent, express or implied, of

(1) (1923) I.L.R., 46 All., 95.

(2) (1909) I.L.R., 31 All., 176.

all the other co-parceners (page 442), and treating the doctrine of legal necessity as really a part of that principle (page 443), they next stated "the only exception" to that general principle as being "antecedent debt" (page 444).

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It will be noted that they described the doctrine of antecedent debt as being an exception of the general principle and not as being part of the doctrine of "pious obligations," to which, however, they make a passing reference before dealing with the exception.

They describe the doctrine of antecedent debt as having had its birth in the necessity of protecting the rights of third persons, e.g., purchasers for consideration in good faith (page 445). They note that the doctrine of the protection of the rights of third parties applies where and only where the property has passed out of the family (page 446). They next make in regard to antecedent debt the qualification that the debt must have been not only antecedently incurred but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate (page 447), and point out that a debt does not become an antecedent debt merely because the joint family property was pledged to raise money to discharge it (page 448). (I shall not take that this is the only proposition in this case which was accepted in *Brij Narain's* case). Lastly it is to be noted that they hold that the pious obligation to discharge the father's debt only comes into existence after the father's death (page 444).

Now let us examine their Lordships' pronouncements in *Brij Narain v. Mangal Prasad* (1). Sitaram, having two minor sons constituting with him a joint family, made three mortgages of the same joint family

(1) (1923) I.L.R., 46 All., 95.



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property. The first and the second mortgages were made in 1905 and 1907, respectively, in favour of mortgagees other than Raja Brij Narain Rai and Jagdish Rai, the mortgagees in the third mortgage. The third mortgage was of date the 4th of March, 1908, for Rs. 11,000 in favour of Raja Brij Narain Rai and Jagdish Narain Rai, the latter of whom subsequently transferred his rights to the former. This third mortgage was for the purpose of obtaining money to pay off the two earlier mortgages.

In 1912 Raja Brij Narain Rai obtained an *ex parte* decree on his mortgage. The present suit was brought on the 19th of November, 1924, by the sons against their father and Raja Brij Narain Rai for a declaration that as against them (a) the mortgage was not binding, and (b) the decree void. As a result of the proceedings in the trial court and the High Court it was eventually found that (a) the property was joint ancestral property, (b) that the whole Rs. 11,000 had been used to pay off the two earlier mortgages, (c) that the plaintiffs were not properly represented in the first suit, and (d) that on the evidence it was not possible to determine, —the necessity for which determination was indicated by the decision in *Sahu Ram Chandra's* case,—whether the first two mortgages had been incurred to discharge obligations not only previously incurred but incurred irrespective of the joint family property, and that it was not therefore possible to hold it established that the two first mortgages constituted such antecedent debt as would support the third mortgage in suit.

The trial court had dismissed the suit and the appeal was dismissed. Brij Narain appealed to the Privy Council. Before the Board it was argued for the mortgagees appellants that though they must admit that the respondents (sons) were not bound by the *ex parte* decree

as they had not been properly represented, the appellants mortgagees were entitled to a declaration that the property was bound and liable to execution (page 99).

The appeal was heard by a Full Board, expressly in view of the conflicting decisions in the Allahabad and Madras Courts and expressly with the view of reconsidering the case of *Sahu Ram Chandra*.

Their Lordships, after saying that it could not be denied that the law was illogical and in the absence of binding authority could not be accepted (page 101), stated the general principle as being that a manager can ordinarily only bind the joint family property for legal necessity (page 101).

They then referred to the doctrine of the pious obligation on the sons to discharge their father's debts, if not immoral, as a concurrent doctrine (pages 101-102). They stated that a son's interest in the joint family property may become liable (a) in execution of a decree against the father (page 101); (b) by being mortgaged by the father to pay the debt for which otherwise decree might be taken and execution be sought (page 101).

They say "the term 'antecedent' debt represents a more or less desperate attempt to reconcile the conflicting principles;" (i.e., "the general principle" and "the doctrine of pious duty") (page 102).

They refer to the anomaly that where a father takes a like sum from A and B, and where he gives to A a mortgage of the joint family property with a personal covenant A cannot ordinarily recover on his mortgage, while, where he gives to B a simple acknowledgment, B can recover against the joint family property (page 102).

They describe the doctrine of antecedent debt as seemingly having been invented to help A (if the debt for which the mortgage was given was in any proper

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sense antecedent) to escape being defeated by the plea that the general principle was being infringed (page 102).

This leaves of course the simple case of a mortgage unsupported by antecedent debt to be covered by the general principle.

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As to *Sahu Ram Chandra's* case they say that it "must not be taken to decide more than what was necessary for the judgement, namely, that the incurring of the debt was there the creation of the mortgage itself and there was no antecedency either in time or in fact" (page 102); (i.e., they repudiate the idea that there was any necessity for the antecedent debt to have been incurred independently of the security of the joint family property).

They dissent from the proposition in *Sahu Ram Chandra's* case that the pious obligation on the sons only arises after the death of the father (page 103).

They next state the well known five propositions, "as the result of these authorities", with which their judgement concludes.

Applying those propositions to the case before them they held that there was an antecedent debt, allowed the appeal and gave Raja Brij Narain a declaration that his mortgage affected the estate, which might be brought to sale.

Contrasting these two judgements the following points may be noted :—

*Sahu Ram Chandra's* case, after stating the general principle, describes the doctrine of antecedent debt as constituting an exception to that general principle and only mentions the doctrine of the pious obligation on the sons incidentally. In *Brij Narain's* case the doctrine of the pious obligation on the sons is specifically described as a principle concurrent with the general principle, and the doctrine of antecedent debt is described as a part of the doctrine of pious obligation.

Again, *Sahu Ram Chandra's* case speaks of the doctrine of antecedent debt as having "arisen from the necessity of protecting the rights of third persons" and again as having "been invoked for the protection of third parties, whose rights in or with regard to it have been acquired in good faith" (top and bottom of page 445). On the other hand in *Brij Narain's* case the doctrine of antecedent debt is described as "a more or less desperate attempt to reconcile the conflicting principles" (i.e. the general principle and the principle of pious obligation) (page 102).

In *Brij Narain's* case the proposition propounded in *Sahu Ram Chandra's* case that an antecedent debt, to be effective, must have been incurred independently of the joint family property was repudiated.

In *Brij Narain's* case the proposition propounded in *Sahu Ram Chandra's* case that the pious obligation on the sons only arises after the father's death was repudiated.

Finally, in *Brij Narain's* case their Lordships said that *Sahu Ram Chandra's* case must not be taken to decide more than what was necessary for the judgement, namely, that the incurring of the debt was there the creation of the mortgage itself and that there was no antecedency either in time or fact.

In view of all the foregoing I think we are bound to treat anything that was stated in *Sahu Ram Chandra's* case as no longer of weight, except the decision that the debt created by the mortgage itself is not an antecedent debt.

The present case before us must then be decided in the light of their Lordships' latest pronouncement in *Brij Narain's* case, unaffected by what may have been said or suggested in *Sahu Ram Chandra's* case.

The first question that arises for determination is whether a mortgage debt comes within the second propo-

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sition stated by their Lordships. I am of opinion that it does not. In the first place we have in the second proposition the use of the word "debt" and in the third proposition the use of the phrase "burdens the estate by mortgage". Here we have a contrast immediately suggesting a distinction between simple debt and debt secured by mortgage. The distinction between these two phrases is further indicated by the use of the phrase in the fifth proposition, "contracted the debt or burdens the estate."

But there is, I think, another and conclusive consideration. One might naturally expect to find that the five propositions laid down at page 104 would appear somewhere as having been discussed in the course of the judgment, and examination of that discussion may throw further light, if further light be necessary, on this question. The first proposition is referred to in the middle of page 101. It deals merely with the general principle. On the same page they refer to the principle of pious obligation and refer to the two characteristics of that principle where they say that the family estate "may become liable by being taken in execution on the back of a decree obtained against the father, or it might become liable by being mortgaged by the father to pay the debt for which otherwise decree might be taken and execution be sought". In speaking of these two consequences their Lordships clearly seem to be contrasting simple debt and mortgage debt, otherwise the phrase would have no meaning; and those two consequences, respectively, clearly seem to correspond to the second and third propositions. This is made still more clear in the illustration which they give at page 102, where they speak of the father giving to B a simple acknowledgment of loan and giving to A a mortgage. Here, again, these two illustrations of the action of the father seem clearly to correspond to the second and third propositions. I have no hesitation, then,

in holding that the present case, which is a case of a mortgage, does not come within the second proposition.

Does it then come within the third proposition? It clearly does. There is a mortgage debt and admittedly the mortgages were not entered into for the purpose of discharging any antecedent debt. The mortgages did not therefore bind the estate and no question of any burden on the plaintiffs to prove immorality arises. It is a simple case of a mortgage by the father manager of joint family property, in which, there being no antecedent debt, no question of the operation of the doctrine of pious obligation arises. It comes within the general principle that the mortgage is not binding unless the mortgagee is able to prove legal necessity.

In the present case no legal necessity has been established. The plea was taken by the plaintiffs that there was no legal necessity; the defendant contended that there was. The trial court originally took a correct view of the case and framed an issue as to legal necessity and evidence was recorded on that issue (page 10, line 15, of the paper-book). The trial court did not actually decide the issue of legal necessity, but it is clear that the mortgagee defendant himself abandoned his plea, for the trial court remarks :—"At the time of argument it was pointed out to me that the fact that the mortgages had merged into a decree had made a great difference and now the plaintiffs cannot succeed unless they can show that the debts were immoral." The defendants clearly then abandoned the plea of legal necessity and endeavoured to throw the burden of proving immorality on to the plaintiffs. It is not surprising that they took at the last moment this desperate step, for the trial court later, at the bottom of the same page, at line 39, remarked :—"The evidence of the plaintiffs in proof of the immorality of the debts is as bad as that of the defendants in proof of legal necessity." It is true that neither the trial court nor the lower appellate

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court expressly found on the question of legal necessity, but in the view that I take that the defendant abandoned the plea of legal necessity in the trial court it would be too late for him to endeavour to set it up here or to ask for a remand of the case for the trial of that issue.

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I need only briefly mention the contention that the plaintiffs' suit was barred by the fact that (though admittedly the property had not passed out of the family) the mortgagee had obtained a decree. . We are only asked to hold this on the strength of a current of decisions in the Oudh Court and the view of one Judge of this Court as reported in *Lal Singh v. Jagraj Singh* (1), in which view the other member of the Division Bench did not concur. Mr. JUSTICE WALSH, in holding that the fact that a decree had been obtained on the mortgagee threw on the son the burden of proving immorality, was very largely influenced by the passage which he quotes at page 549 of the report from the judgement of their Lordships in *Sahu Ram Chandra's* case quoted at the top of page 446 in I.L.R., 39 Allahabad. Mr. Justice WALSH refers to the fact that if their Lordships who decided *Brij Narain's* case did not consider that passage to be good law it is strange that, although they expressly repudiated another proposition in *Sahu Ram Chandra's* case, they did not repudiate this or refer to it, and that their silence suggests that it met with their approval. I have already given above *in extenso* my reasons for holding that nothing in *Sahu Ram Chandra's* case can be taken to be of any weight since the pronouncement in *Brij Narain's* case, with the exception of the one point decided which their Lordships in *Brij Narain's* case expressly stated. I should not, therefore, be inclined in any case to feel that I was bound by the particular proposition quoted from *Sahu Ram Chandra's* case. Still less do I feel influenced by the passage in question, upon

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a consideration of the particular passage and the connection in which it found expression. Their Lordships, as appears from the top of page 445 and again from the bottom of page 445 in I. L. R., 39 Allahabad, were only referring to the rights of third parties for the purpose of indicating those rights as being the source from which the doctrine of antecedent debt had its origin. I have noted that that proposition itself was not accepted by their Lordships in *Brij Narain's* case. Further, the conclusion which their Lordships in *Sahu Ram Chandra's* case, at the top of page 446, draw from "a perusal of the numerous authorities" is purely a general conclusion, and merely generally illustrating that there are cases where the rights of third parties have to be given effect to. They were not considering whether, in order to give those rights of third parties effect, the property must have passed out of the family or not. There is no suggestion that there was present in their mind the idea that a decree might have the same effect as a sale. On the contrary, in the passage which they subsequently quote from two authorities there is the express idea evidenced in the passages quoted that the property must have "passed out of" the joint family. In the present case it is manifest that the property had not passed out of the joint family. I am not in this case concerned to consider what would be the consequences of a sale in pursuance of the execution proceedings or a voluntary sale by the father to satisfy the decree.

I would allow the appeal and decree the plaintiffs' suit with costs.

BY THE COURT :—The order of the Court is that the appeal be allowed with costs, the decrees of the courts below are set aside and the plaintiffs be granted a declaration against the defendant Hoshyar Singh that the property mortgaged is not liable to be sold in execution of the decree obtained by him.



*Before Mr. Justice Sulaiman, Acting Chief Justice, Mr. Justice Mukerji and Mr. Justice Boys.*

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*Act No. IX of 1872 (Indian Contract Act), sections 11, 25(2)  
—Minor—Money borrowed on bond by a minor—Fresh  
bond executed after attaining majority for the original  
loans plus interest—Whether valid.*

Where a minor borrowed a sum of money, executing a simple bond for it, and after attaining majority executed a second bond in respect of the original loan plus interest thereon :

*Held by SULAIMAN, A. C. J., and BOYS, J., (MUKERJI, J., dissenting), that a suit upon the second bond was not maintainable, as that bond was without consideration and did not come under section 25, clause (2), of the Indian Contract Act.*

*Per MUKERJI, J.*—Section 25, clause (2), applied to the case and the bond was not void for want of consideration.

*Mohori Bibee v. Dharmodas Ghose (1), Bindeshri Prasad v. Sarju Singh (2), Narain Singh v. Chiranji Lal (3), Gregson v. Uday Aditya Deb (4), Bindeshri Bakhsh v. Chandika Prasad (5), Indran Ramaswami v. Anthappa Chettiar (6), Sindha Shri Ganpatsingji v. Abraham (7), Karm Chand v. Basant Kaur (8), Ram Rattan v. Basant Rai (9), Narendra Lal v. Hrishikesh (10) and Kundan v. Sree Narayan (11), referred to.*

THE facts of the case may be briefly stated as follows :—On the 24th of June, 1919, the defendant, who was then a minor, executed a simple bond for Rs. 40, bearing interest at 2 per cent. per mensem, in favour of the plaintiff. On the 17th of June, 1923, by which date he had become of age, the defendant executed a simple bond for Rs. 76, which recited and represented the Rs. 40 which had been taken on the previous bond

\*Civil Revision No. 189 of 1927.

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| (1) (1908) I.L.R., 30 Cal., 539. | (2) (1923) 21 A.L.J., 446.        |
| (3) (1924) I.L.R., 46 All., 568. | (4) (1889) I.L.R., 17 Cal., 223.  |
| (5) (1926) I.L.R., 49 All., 137. | (6) (1906) 16 M.L.J., 422.        |
| (7) (1895) I.L.R., 20 Bom., 755. | (8) (1910) 11 Indian Cases, 321.  |
| (9) (1921) I.L.R., 2 Lah., 263.  | (10) (1918) 46 Indian Cases, 765. |
| (11) (1906) 11 C.W.N., 135.      |                                   |

and Rs. 36 interest thereon. The plaintiff filed a suit on this bond in the Court of Small Causes, and it was dismissed. The plaintiff applied in revision to the High Court and the case was referred to a Bench of three Judges.

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Babu *Satish Chandra Das* and Pandit *Ambika Prasad Pandey*, for the applicant.

The opposite parties were not represented.

SULAIMAN, A.C.J. :—The present case must be decided on the provisions of the Indian Contract Act. Analogies drawn from the English Common law, where the contract of a minor is only voidable, are wholly inappropriate when we have a codified law in this country. Since the case of *Mohori Bibee v. Dharmodas Ghose* (1), it is now settled law that a contract by a minor is not only voidable but is altogether void. But although such a contract is void, it cannot be said to be prohibited by law or otherwise unlawful. Nor does any question of public policy arise. Section 23 is inapplicable.

Under section 11 a minor is not competent to contract. He is disqualified from contracting. He can, therefore, neither make a valid proposal, nor make a valid acceptance, as defined in section 2, clauses (a) and (b). He cannot, therefore, for the purposes of the Act be strictly called a promisor within the meaning of clause (c). Nor can, therefore, anything done by the promisee be strictly called a consideration at the desire of a promisor, as contemplated by clause (d). It may, therefore, be urged that an agreement by a minor cannot be *strictly* described as being one for "consideration" as defined in the Act. It is not, however, necessary to decide this point.

The question before us is whether consideration received by a person during his minority can be a good

(1) (1903) I.L.R., 30 Cal., 539.

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consideration for a fresh promise by him after his attainment of majority. No doubt under section 2 a past consideration may be a good consideration, but that past consideration must be an existing one and a valid one. Section 25 is the only section which declares that an agreement made without consideration is void. The whole question is whether such a transaction falls within section 25, sub-clause (2).

The case of *Bindeshri Prasad v. Sarju Singh* (1) is distinguishable. There the defendant's father was a disqualified proprietor when he had incurred the first debt. The defendant was a major when he borrowed Rs. 1,800 and agreed to pay not only that amount but also the money borrowed by his deceased father. The finding was that the creditor would not have advanced more money without an undertaking by the defendant to pay the whole amount. The contract by the father was void but that made by the son was not so, and as there was fresh consideration for it, it was not without consideration. The promise was therefore held to be enforceable.

In the case of *Narain Singh v. Chiranji Lal* (2), it was remarked that if a minor, when of full age, takes it upon himself to pay a previous debt, there is no reason, either in law or equity, why his agreement should be deemed to be "unlawful". Of course there is no question of unlawfulness, but one of want of consideration. This also was a case of a further advance after majority. There is no question of ratification in such cases. The case of *Gregson v. Uday Aditya Deb* (3) was distinguishable on the ground that the transaction of a disqualified proprietor was voidable. But the language of section 37 of the Court of Wards Act is similar to that of section 11 of the Contract Act, and it is difficult to hold that a contract by a disqualified proprietor is only voidable and

(1) (1923) 21 A.L.J., 446.

(2) (1924) I.L.R., 46 All., 568.

(3) (1889) I.L.R., 17 Cal., 223.

not void. The real ground on which the Privy Council case is distinguishable is that although the contract had commenced during the period of disqualification, it had been continued and performed after the disqualification had ceased and fresh advances also had been made by the creditor.

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Section 25, sub-clause (2), applies when there is a promise to *compensate* wholly or in part a person who has already *voluntarily done something for the promisor*. The word "compensate" has been used advisedly and does not connote the same idea as repayment of a loan. The word "voluntarily" also indicates to my mind that something has been done without any promise of compensation. It may or may not have been done out of one's own accord without any request of the other person, but there should not be any understanding between the parties that compensation would be given for the act in future.

Similarly the expression "done something for" does not in my opinion mean "advance money to another person." Doing something *for* a person is not paying money *to* him.

There is another reason why I think that clause (2) does not apply to such a case. Payment of money is covered by clause (3). If it fell under clause (2), a promise to pay a previous loan, whether it was contracted by a minor, or whether it was barred by limitation, or whether it was a parole debt, or money advanced on a bond, would be equally good. Clause (2) would be wide enough to cover all such cases without any limitation. Such a result was obviously not contemplated by the Legislature. It accordingly made a special provision for a time-barred debt and permitted such a debt to be a good consideration, provided the promise was in writing signed by the party to be charged therewith or his agent. If the

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previous indebtedness can be a good consideration, it is hardly appropriate to say that the said consideration has failed. In the same section the Legislature has used two distinct expressions, "compensate for something done", and "pay a debt", in two different clauses. They obviously do not mean the same thing. The fact that clause (3) specially provides for time-barred debts suggests to my mind that such a debt does not come within clause (2).

It may further be observed that in consideration for the first advance made by the creditor he obtained a promissory note from the minor. The consideration was, as held by some of the learned Judges of the Madras High Court, completely exhausted. There was no longer any subsisting consideration which would support a subsequent promise to pay after attaining majority. Such a fresh promise, if no further advance is taken, is totally without consideration and therefore void and unenforceable.

MUKERJI, J.:—This is a reference to the Full Bench and has arisen under the following circumstances. One Suraj Narain lent a sum of money on the 24th of June, 1919, to one Sukhu Ahir, who was at that date a minor. Nearly four years later, on the 17th of June, 1923, in consideration of the principal sum lent and interest, which had swelled together to the sum of Rs. 76, Sukhu Ahir, who had by that time attained majority, and his mother gave a simple money bond to Suraj Narain. Suraj Narain brought a suit in the Court of Small Causes at Jaunpur. He was met with the plea that the previous bond, having been executed by a minor, could not form a valid consideration for the subsequent bond and the suit must fail. The learned Judge, Small Causes Court, referred to two conflicting rulings of this Court and, following the later ruling, dismissed the

suit. The plaintiff came up in revision to this Court and the learned Judges, before whom the matter came, referred it to a larger Bench.

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On the applicant's behalf a large number of rulings for and against the applicant's contention have been brought to our notice and I am thankful to the learned counsel for this assistance rendered to the Court. This assistance is all the more valuable, because the respondents are unrepresented.

Mukerji, J.

The learned counsel for the applicant has argued that the case is covered by section 25, clause (2), of the Contract Act and that the learned Judge of the court below was wrong in holding that the contract is without consideration.

Section 25 of the Contract Act says that an agreement made without consideration is void, but furnishes certain exceptions. One of the exceptions is when the consideration takes the shape of "a promise to compensate wholly or in part a person who has already voluntarily done something for the promisor." The question is whether it is not the case that Suraj Narain, by advancing the sum of Rs. 40 on the 24th of June, 1918, does not fall within the description of "a person who has already voluntarily done something for the promisor." I have consulted Stroud's Dictionary and Wharton's Law Lexicon. According to them, the word "voluntarily" is used in contradistinction from the word "compulsorily" or the expression "under compulsion". It has been suggested that where a person does something at the request of another, he cannot be said to have done that thing voluntarily. Let us take an example. A man, on going out of the station, asks a poor neighbour of his to be good enough to look after his house which would lie unoccupied. The neighbour, as a good neighbour, takes care of the house and when the occupant

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comes back he agrees to pay his poor neighbour Rs. 20 for services rendered. Can it be said that the poor neighbour did not act as he did, voluntarily? I do not think it can be said that the act was otherwise than voluntary. The poor neighbour could not possibly sue, for his wages, his richer neighbour, for there was no contract to compensate. There may have been an expectation that some bounty would come out of the pocket of the richer neighbour, but it was a mere expectation and there was no lawful claim. Then it was suggested that the expression "has done something" will not cover a case of payment of money, but the definition of "consideration" to be found in section 2, clause (d), of the Contract Act will show that the expression "doing something" has been used there and must be taken as being wide enough to cover a case of payment of money.

Yet a third objection was suggested, and it was this. If the consideration paid for what turned out to be a void contract, on account of the minority of Sukhu Ahir, could be treated as something done by Suraj Narain, the case of a debt barred by limitation would be covered by clause (2) of section 25 and clause (3) of the same section would be a superfluity. I do not think that this suggestion is really weighty. When there is a good contract, enforceable in law, the consideration paid is, to use an unscientific but expressive word, counter-balanced by the consideration passing from the other party. Once there a perfected contract, that contract alone can be enforced and it is not a case where a consideration has failed. The case where a consideration has failed would be covered by the second clause, but not a case where the contract was good. It was, therefore, necessary to provide separately for the case of a debt which was quite good but was not enforced within time by the creditor. Suraj Narain, in giving Rs. 40 to Sukhu, got nothing in return. The payment was,

therefore, "something done", but for, practically, no consideration.

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Mukerji, J.

I do not at all propose either to enter into a discussion of the English law or into a discussion of the cases decided in the several Indian courts. The English law is not the same as the law in India and many of the Indian cases do not consider section 25, clause (2), at all. In *Chunna Mal v. Mool Chand* (1), the Privy Council disapproved of reading a section of the Indian Contract Act in the light of English law, and they made similar observations in *Ramanandi Kuer v. Kalawati Kuer* (2). Under the English law (Infants Relief Act, 1874, section 2) the contract by a minor, in the circumstances of the present case, would *not* be void like a contract by a minor, but no action is allowed to be maintained to enforce the contract. Such a suit would not be maintainable even where a part of the consideration is fresh and the balance consists of money lent during the defendant's minority. This Court, however, held in *Bindeshri Prasad v. Sarju Singh* (3), that such a contract would be good and enforceable in India. Some Lahore cases considered section 25, clause (2), and held that it did apply. In some others in the same Court it was held that it did not apply. In the Madras High Court it was said that the consideration originally paid under the void contract had, as it were, spent itself and could not support the subsequent contract; but, with respect, it is because the earlier contract has been found to be void that the second contract has been allowed by section 25, clause (2), to be valid. In my opinion it is not the province of a Judge to consider abstract principles of law and to find what that law should be, where the law is laid down in plain language and as the only guide. Reading section 25, clause (2), as it stands

(1) (1928) I.L.R., 9 Lah., 510.

(2) (1927) I.L.R., 7 Pat., 221 (227).

(3) (1923) 21 A.L.J., 446.



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and giving every word its natural meaning, and comparing the language with the language of the definition of "consideration" to be found in section 2, clause (d), of the Act, I am perfectly satisfied that the case of Suraj Narain is approved of by the Contract Act.

I would, therefore, hold that the bond is not void for want of consideration and should be enforced in a court of law.

Boys, J. :—This reference to a Full Bench concerns the validity of an alleged contract entered into by an adult, nominally replacing but in effect confirming an unenforceable agreement into which he had entered when still a minor.

The facts are that on the 24th of June, 1919, Sukhu the defendant, who was then a minor, executed a simple bond for Rs. 40, bearing interest at two per cent. per mensem, in favour of the plaintiff, Suraj Narain, the alleged necessity for the borrowing being the payment of land revenue.

On the 17th of June, 1923, by which date he had become of age, Sukhu and his mother, Musammat Bilasi, executed a simple bond for Rs. 76, which recited and represented the Rs. 40 which had been taken on the previous bond and Rs. 36 interest thereon.

Suit No. 145 of 1927 was filed by the lender in a court of a Judge of Small Causes. The learned Judge of that court, holding that there were two conflicting authorities, *Narain Singh v. Chiranji Lal* (1), and *Bindeshri Bakhsh v. Chandika Prasad* (2), and that he was bound to follow the later decision, dismissed the suit. In view of the apparent conflict between these two decisions the plaintiff's application to this Court in revision has been referred to this Full Bench.

(1) (1924) I.L.R., 46 All., 568.

(2) (1926) I.L.R., 49 All., 137.

Let us first consider by itself the earlier agreement, that of June 24th, 1919. It may seem superfluous to note the importance of keeping in mind of which agreement we are speaking, but in some of the cases it is the failure to do so which has led, I say so with all respect, to error. Particularly in reference to section 25 (2) we shall find that part concerns the earlier stage and part concerns the later stage of the transactions, while the opening words of the section concern the later stage only.

The first agreement was entered into while Sukhu was yet a minor, and was manifestly, and the contrary is not contended, an unenforceable agreement and therefore void [section 2 (g)], Sukhu being not competent to make a contract.

It may be emphasized here (for the distinction, as will appear later, is of importance) that this agreement was not enforceable because the minor was not competent to contract and not because no consideration passed from him. "Competency to contract" and "consideration" are two distinct elements of a contract, and an agreement may fail to amount to a contract owing to the absence of either or both of them. The omission to bear in mind this distinction has also, I think, led to inaccuracy.

In this first agreement there was no "competency to contract" but there was "consideration". The minor made a promise and gave a bond, and a promise amounts to consideration, compare section 2 (d), though the promise may for some reason be unenforceable. "Consideration" and "contractual capacity" being co-ordinate constituents of a contract, the latter element should not be imported into the definition of the former; compare *Indran Ramaswami. v. Anthappa Chettiar* (1). The lender would of course have not advanced the money

(1) (1906) 16 M.L.J., 422.

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without the promise and the bond. In the first agreement, then, there was "consideration" on both sides offered and accepted.

Boys, J.

The first agreement being void, it could not be, and it is not contended that it was or could be, the subject of ratification. In fact the word "ratification" does not even appear in the Contract Act in this connection. What is contended is, that there was a new and independent fresh agreement which is enforceable. The second agreement we must now consider.

Admittedly there was now competency to contract, and the answer will be found to turn on the question whether the other element, viz., consideration, existed, and on the interpretation of sections 2 (d) and 25, second exception.

In cases, exactly or nearly similar in their facts, in which the later agreement has been enforced as amounting to a contract, it is first to be noted as remarkable that the reasoning has advanced from two diametrically opposed standpoints. On the one hand it has been held, relying on section 2 (d), that the agreement was supported by consideration, the past service or advance, moving from the promisee and that the agreement was therefore binding on the promisor; compare *Sindha Shri Ganpat-singji v. Abraham* (1), and *Narain Singh v. Chiranji Lal* (2).

On the other hand it has been held that the agreement was without consideration moving from the promisee, and, relying on the second exception to section 25, the agreement was held binding on the promisor; compare *Karm Chand v. Basant Kaur* (3), and *Ram Rattan v. Basant Rai* (4).

But in some cases where it was held that there was no consideration moving from the promisee the court

(1) (1895) I.L.R., 20 Bom., 755.

(2) (1924) I.L.R., 46 All., 568.

(3) (1910) 11 Indian Cases, 321.

(4) (1921) I.L.R., 2 Lah., 268.

did not apply section 25 (2) and held the agreement not binding as to the prior advance or service; compare *Indran Ramaswami v. Anthappa Chettiar* (1); *Narendra Lal v. Hrishikesh* (2) and *Bindeshri Bakhsh v. Chandika Prasad* (3).

The first question, then, for determination is whether in the case of this second agreement in suit there was or was not consideration moving from the promisee, the plaintiff. I do not think that there was.

In *Sindha Shri Ganpatsingji's* case (4) and *Narain Singh v. Chiranji Lal* (5) it was suggested that the consideration moving from the promisee was past service or past loan and reliance was placed on section 2(d), but in my opinion section 2(d) has no application to the facts.

In both cases the facts found or assumed on which the judgements proceeded may be stated as follows :—

(i) *A* asked for something from *B*.

(ii) There was an implied or express promise by *A* to pay.

(In the first case it was found that neither party considered the service as intended to be gratuitous, and in the second there could be no suggestion that the advance was made as a gift.)

(iii) *B* did what he was asked to do.

That is, consideration passed on both sides and there would have been a contract on which *B* could have sued but for *A's* want of competency to contract. The considerations were exhausted, compare *Indran Ramaswami v. Anthappa Chettiar* (1), and the latter promise was actually without consideration. (We are limiting our consi-

(1) (1906) 16 M.L.J., 422.

(2) (1918) 46 Indian Cases, 765.

(3) (1926) I.L.R., 49 All., 137.

(4) (1895) I.L.R., 20 Bom., 755.

(5) (1924) I.L.R., 46 All., 568.

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deration, of course, to services rendered or advances made during minority. To services or advances after majority other considerations would apply.)

Boys, J.

To the facts as above set out section 2 (d) had in terms no application. It applies, so far as we are here concerned with it, to a case where "at the desire" of A, but without any promise made by A, B "has done" something for A and, later, A makes a promise, and then the service is declared to be consideration for the promise.

We shall see later that a corollary to this is to be found in section 25 (2), which deals with the case where something has been done, also without a promise by A, but, further, without any request by A, not at his desire, a case which has to be specially provided for owing to the fact of the absence of any request taking the case out of section 2 (d) and so taking the service out of the definition of consideration.

Section 2 (d) does not state a case where, at the desire of A and upon a promise by A, B has done something and, later, A makes a fresh promise. Where such are the facts between the parties there may or may not be questions as to ratification, acknowledgment, novation, etc., in the particular circumstances, but we are concerned at present only with section 2 (d), and section 2 (d) is not concerned with a case where there was an earlier promise at the time B did something for A and then an additional later promise.

I am of opinion, therefore, that where an advance was made during minority upon a promise to pay, the advance so made cannot by virtue of section 2 (d) be held to be consideration for a subsequent promise made after majority.

The original advance was, then, no consideration for the second agreement. The defendant was given by the second agreement an extended period within which to

pay, but manifestly the grant of that extension could not amount to consideration when there was no liability under the first agreement to pay at all.

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There was in this case no further advance and no further service after the defendant attained majority, as there was in the cases of *Sindha Shri Ganpatsingji v. Abraham* (1); *Kundan v. Sree Narayan* (2); *Narendra Lal v. Hrishikesh* (3), overruling the last case; and *Bindeshri Bakhsh v. Chandika Prasad* (4); so it would be inappropriate to discuss in this case whether such further thing done would or would not constitute consideration for the whole of a promise including the prior advance or service rendered, but I should be prepared, as at present advised, to answer the question in the negative.

The second agreement being without consideration, it is void (section 25) unless it comes within one of the exceptions to that section. It is suggested, and it has sometimes been held, that the case comes within exception (2).

Was there a promise by the defendant to *compensate* the plaintiff for something which he had *voluntarily done* for the defendant?

It is suggested that the promise to repay contained in the second bond was a promise by the defendant to compensate the plaintiff for what he had already voluntarily done, i.e. lent him money. I think the contention cannot be supported.

Before discussing authorities, the very wording of the exception itself suggests to me its inapplicability to such cases as the present. Too narrow an interpretation must, of course, not be put on words intended to cover a class of cases differing in their detailed circumstances. But the word "compensate" is wholly inappro-

(1) (1895) I.L.R., 20 Bom., 755.

(2) (1906) 11 C.W.N., 135.

(3) (1918) 46 Indian Cases, 765.

(4) (1926) I.L.R., 49 All., 137.

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priate to a promise to "repay money lent", and the words "voluntarily done" are wholly inappropriate to the case of a lender making a loan on a promise of repayment. Nor is the use of the word "voluntarily" to be explained as in antithesis to the word "compellable" in the next sentence. The apparent antithesis is deceptive, for the word "voluntarily" applies to the act of the promisee and the word "compellable" applies to the promisor. The wording of this part of the exception itself suggests to me that the condition is applicable only where the person to be compensated did something for the other person entirely of his own accord without any request, and that it applies to the type of case where, e.g., *A* sees *B*'s boat has got adrift from its moorings and, without any suggestion on the part of *B*, takes steps to recover the boat, and *B*, appreciating the service that has been rendered, promises to compensate. I am in entire accord, in this respect, with what was said in *Sindha Shri Ganpatsingji v. Abraham* (1):—"The section (section 25) appears to cover cases where a person without the knowledge of the promisor, or otherwise than at his request, does the latter some service and the promisor undertakes to recompense him for it." That is the natural meaning of the language.

So read, we find section 25 (2) a natural corollary to section 2 (d). *A* has done something for *B* without any promise made by *B* at the time. If *A* did the thing at *B*'s desire and *B* subsequently made *A* a promise, the thing done by *A* is, by virtue of section 2 (d), consideration which renders *B*'s promise binding. But if *A* did the thing without any expression of desire by *B*, then although *B* might make a subsequent promise, the case would not, for want of the request by *B*, come within section 2 (d), and the thing done would not constitute consideration for the promise. To prevent such a promise

(1) (1895) I.L.R., 20 Bom., 755.

not being binding, section 25 (2) has been inserted as an exception to the rule with which section 25 opens.

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Again, if the word "voluntarily" did not exclude cases where the thing was done at the request of the person subsequently making the promise, the clause would as to those cases be out of place, for by section 2 (d) the thing done would be "consideration" for the promise and the case would not come within the opening words of section 25 and there would be no need to make an exception in regard to it.

Boys, J.

In passing, it may be noted that the term "agreement" used in section 25 is hardly appropriate to the facts mentioned in the second exception, on any view of the scope of the word "voluntarily".

To consider now the judicial authorities bearing on section 25 (2). In *Karm Chand v. Basant Kaur* (1), it was said:—"As at the time when the thing was done the minor was unable to contract, the person who did it for the minor must, in law, be taken to have done it voluntarily" (page 330, column 2). This would suggest that "voluntarily" is equivalent to "for a person incompetent to contract." I have already referred to the distinction between "absence of consideration" and "absence of competency to contract", and noted that the word "voluntarily" is quite inappropriate to a case where consideration moved from the promisor.

Then it was said:—"Section 25 of the Act was intended to give effect to agreements which would otherwise be void as being without consideration; an infant's agreement is such, and, in our opinion, the provisions of the section, which are wide in terms, apply no less to such an agreement than to a contract by a major to pay for past services". (Page 330, column 2.) It is of course clear that section 25 was intended to give effect to

(1) (1910) 11 Indian Cases, 321.



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some (not *all*) agreements which would otherwise be void as being without consideration; but, apart from this obvious limitation, I would, with all respect, point out that here there seems some confusion. The agreement in this case which the opening words of section 25 declare to be void is not the infant's agreement, the first one, but the second, the major's agreement.

One of the cases relied upon was *Kundan v. Sree Narayan* (1), which has since been overruled in *Narendra Lal v. Hrishikesh* (2).

The next case, *Ram Rattan v. Basant Rai* (3), practically did no more than follow *Karm Chand v. Basant Kaur* (4) and *Kundan v. Sree Narayan* (1), which latter, as I have noted, was relied on in *Karm Chand's* case and has been overruled.

On the other hand I find support for my own view in the three following cases. To *Indran Ramaswami v. Anthappa Chettiar* (5), I have already referred in another connection. The full text is not available to me at the moment, but the facts appear to have been similar to the present case and section 25 (2) was not applied.

To *Narendra Lal v. Hrishikesh* (2) I have also referred as overruling *Kundan v. Sree Narayan* (1). In both cases there was also a further advance. It was, however, said in *Narendra Lal's* case:—"Section 25 does not include the renewal of an infant's promise, apparently because an infant's promise does not give rise to an imperfect obligation but is *ab initio* void" (page 773, column 2). And again, in considering the enforceability of the promise to repay the advance made during minority, it was said:—"An agreement by a minor is void, not voidable, and as such it does not admit of ratification. It would, I think, be inconsistent with the general

(1) (1906) 11 C.W.N., 135.

(2) (1918) 46 Indian Cases, 765.

(3) (1921) I.L.R., 2 Lah., 263.

(4) (1910) 11 Indian Cases, 321.

(5) (1906) 16 M.L.J., 422.

tenor and policy of the Contract Act to hold that though the agreements were void when they were made and cannot be ratified by the promisor on attaining majority, nevertheless the same result can be achieved by the promisor taking a trifling loan from the promisee and promising to pay off that sum and the old irrecoverable debts" (page 774, column 1). A decree was only given for the payment of the new advance.

*Bindeshri Bakhsh v. Chandika Prasad* (1) was another case in which there was also a further advance and a decree was only given for the amount of the further advance.

For the reasons that I have given I hold that neither section 2 (d) nor section 25 (2) is of any help to the plaintiff creditor.

I am not overlooking that, if there was in fact no desire expressed at the time and no promise made at the time the money was advanced or the service rendered during the minority but only a promise after attaining majority, the case might come literally within section 25 (2), but obviously such a case would be rare; compare the remarks in *Sindha Shri Ganpatsingji v. Abraham* (2). The present is not such a case and I have not to consider it.

I would add that where the Legislature has declared an infant incompetent to contract, has declared his agreements void, and has pointedly refrained from declaring them to be merely voidable contracts, and from giving him any power of ratification, it would take very cogent reasons to compel me, were I in doubt which I am not, to admit a creditor by a back door where the Legislature had closed the front. That is, however, only a question of expediency and public policy. I am of opinion that the law also forbids it.

(1) (1926) I.L.R., 49 All., 137. (2) (1895) I.L.R., 20 Bom., 755.

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On the broad principle of expediency it is urged, "Why should an adult be unable, having reached maturity, to make a binding promise to pay money he had actually received?" To my mind there is every reason. A lender would be able to advance money to an inexperienced boy, knowing that, as soon as the boy became of age, he, the lender, could use as a lever to extract a fresh promise the argument that it was a debt of honour and shame him into making a fresh promise to discharge an obligation which he had incurred at a time when, *ex hypothesi*, he was not capable of judging for himself.

I would dismiss the application.

By THE COURT :—The order of the Court, in accordance with the opinion of the majority, is that this application be dismissed with costs.

*Application dismissed.*

### PRIVY COUNCIL.

\* J. C.  
1928  
November 2.

JUGGI LAL, KAMALAPAT (DEFENDANTS) v. SWA-  
DESHI MILLS COMPANY, LTD. (PLAINTIFFS).

[On Appeal from the High Court of Allahabad.]

*Trade-mark—Passing off—Colourable imitation—Deception of illiterate persons—Trade name associated with mark—Damages.*

The respondents dealt largely in Indian clothes, and in connection with sales thereof used a trade-mark in which the lotus flower was the leading feature, and their cloths had become known as "lotus cloth". The appellants made and sold cloths upon which they used marks which would be apt to be confused with the respondents' mark by illiterate and unobservant people, and to be accepted by purchasers wishing to buy "lotus" cloth. The respondents brought a suit against the appellants for passing off; they claimed damages,

\* Present :—Viscount DUNEDIN. Lord SHAW. Lord PLANESBURGH and Sir JOHN WALLIS.

giving up a claim to an account of profits. The High Court held the appellants liable. In assessing damages the Court assumed that 60 per cent. of the sales made by the appellants of goods bearing the offending mark were due to the use of that mark, and awarded the respondents 9 per cent. of the sale price of the 60 per cent. as the profit thereon lost to the respondents.

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*Held* that in the circumstances above stated the respondents' cause of action was established; but that the assumption made in assessing the damages was far too speculative. Though no definite rule could be laid down for estimating the damages in such a case it would be safer to award a sum representing the profit (at 9 per cent.) upon the falling off in the respondents' sales after the offending mark was used, together with a sum representing the profit upon an increase which might have taken place in their trade.

*Johnston v. Orr Ewing* (1) applied.

Judgement of the High Court, I. L. R., 49 All., 92, varied as to damages.

APPEAL (No. 116 of 1927) from a judgement of the High Court (June 7, 1916) in a suit transferred to the Extraordinary Original Jurisdiction of that Court from the court of the Subordinate Judge of Cawnpore.

The respondents brought the present suit in the court of the Subordinate Judge against the appellants alleging infringements of trade-marks to which they had the exclusive right by user; they claimed an injunction, an account of profits, and other relief. They subsequently gave up their claim to an account, and claimed damages.

The suit was transferred to the High Court and was heard by MEARS, C. J., and MUKERJI, J.

The facts appear from the judgement of the Judicial Committee, and more fully from a report of

(1) (1882) 7 App. Cas., 219.

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the proceedings in the High Court at I. L. R., 49 All., 92.

Upon the grounds appearing in that report, the High Court held that the appellants were liable in damages, which were assessed in the manner appearing in the present judgement.

1928. October, 30; November, 1, 2. *Sir Duncan Kerly, K. C., Sir George Lowndes, K. C., Wallach and F. E. Bray*, for the appellants:—The marks used by the appellants were not colourable imitations of the respondents' mark, nor likely to deceive purchasers. An exaggerated view of the illiteracy of retail buyers was taken. In any case the decree for damages should be set aside. There was no relevant or convincing evidence of any substantial damages. It could not properly be assumed that cloth sold by the appellants bearing the offending mark would have been sold by the respondents but for the use of the mark: *Leather Cloth Co. v. Hirschfeld* (1), *Kinnell and Co. v. Ballantine & Sons* (2).

*W. A. Greene K. C., Archer K. C., and E. B. Raikes*, for the respondents:—Applying the principles laid down in *Seixo v. Provezende* (3) and *Johnston v. Orr Ewing* (4) the evidence fully established an actionable passing off. The High Court was entitled on the evidence to draw the inference upon which they based the damages. The acts of the defendants were fraudulent, and *omnia presumuntur contra spoliatores*. The Court in no way misdirected itself; had the damages been awarded by a jury, the verdict would not have been assailable. The cases relied upon by the appellants are distinguishable upon their facts.

(1) (1865) L.R., 1 Eq., 299.  
(3) (1866) L.R., 1 Ch., 192.

(2) (1910) 27 R.P.C., 185.  
(4) (1882) 7 App. Cas., 219.

Reference was made also to *Boord & Son v. Bagots, Hutton & Co.* (1).

*Sir Duncan Kerly, K. C.* replied.

The judgement of their Lordships was delivered by Viscount DUNEDIN :—

This is a case of the class which is generally known as a passing off action.

The plaintiffs, who are the respondents before this Board, are a milling company who deal largely in Indian cloths, and who, in connection with the sale of that Indian cloth, use certain trade-marks. In several of those trade-marks, either in conjunction or alone, the lotus flower is the leading feature. Now their complaint is that the defendants, who are appellants before this Board, suddenly began to use trade-marks which, though if critically looked at by a person of such literacy as to have critical powers of observation would not be confused, yet would be apt to be confused by the illiterate and unobservant; and in particular did despite to them for this reason that their trade-mark had really got to be associated with the name of "Lotus," so that their cloth was known as "Lotus cloth," and that a person coming and asking for "Lotus cloth" might be satisfied by having cloth delivered with the trade-mark of the defendants. That there may be deception, as one might phrase it, by sound as well as by sight was nowhere more forcibly insisted on than in the well-known case of *Johnston v. Orr Ewing* (2).

The plaintiffs also claimed for an account of profits, but at the trial they gave up their claim for an account of profits and said that they wished instead to claim for damages.

(1) (1196) 2 A.C., 382.

(2) (1882) 7 App. Cas., 219.

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The trial took place before the High Court at Allahabad in its Extraordinary Original Jurisdiction. That court granted an injunction in respect of the trade-marks and also it gave a large sum of damages, namely, Rs. 1,72,800.

Their Lordships have no doubt whatsoever that the judgement of the court was perfectly right as regards the injunction; they think the evidence was quite satisfactory to show that the plaintiffs' cloth was associated with the name of "Lotus" and that any lotus device would lead to cloth being able to be palmed off as their cloth which was the cloth of another manufacturer. There was perhaps a little difficulty as to one of the emblems, where the emblem on the defendants' trade-mark, if looked at properly, was not a lotus but a rose; but it was not only the question of the flower there; there was a garter-like enclosure with a straight line beneath and the whole get-up of the one was so like the whole get-up of the other that their Lordships have no doubt that the court below was right in making their injunction extend as it did.

When, however, their Lordships turn to the question of damages there is more difficulty. The plaintiffs came into court with a demand only for Rs. 25,000 damages, or such other sum as the court might think fit. It seems, according to Indian practice, that they would not be bound down to the figure of Rs. 25,000. When it came to the proof various figures were given and the figure on which the learned Judges below have proceeded was a figure which gave the sale account of the defendants' goods which had this, what may be called pirated, mark upon them. The figure there brought out was, in round figures, Rs. 3,200,000. What the learned

Judges then did was this: They said: "We will assume that of that Rs. 3,200,000 worth of goods the defendants would have sold 40 per cent. if they had merely trusted to their own cloth without the addition of a misleading mark, but 60 per cent. of it must be held to be due to the misleading mark"; and then, taking 60 per cent. of that Rs. 3,200,000, they calculated the figure of 9 per cent. of profit on that and by that calculation they brought out the sum for which they gave judgement.

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Their Lordships think that it is far too speculative an assumption to say that you could divide this figure up into the 60 per cent. and 40 per cent., and they cannot think that there is a justification for a decree founded upon that calculation.

When it comes to the question of what figure is to be substituted the question is not so easy because the matter is very much in the dark. If it had been before a jury it would have been disposed of in the rough and ready way in which juries do dispose of such questions by giving a figure which, if not absolutely out of all question, would have stood the test of any review by a court of appeal.

Their Lordships cannot say that there is any cut and dried rule which can be laid down by a court of law for the estimation of damages in a case like this, but think that on the figures given the safer figures on which to work are the figures which are given which show the falling-off in the respondents' trade which came in after this pirated mark was introduced on the market. If it is assumed that the whole of the falling-off was due to the use of the pirated mark that would bring out a figure of about Rs. 1,000,000 loss of trade, and taking 9 per cent.



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profit on that amount it gives a figure which, put into pounds sterling, would come out at a sum of £4,500. That, however, does not give anything for a possible increase of trade and their Lordships think that on a rough calculation £500 may be added for that, making £5,000, but as the decree must be in rupees it is equivalent to Rs. 67,000. Their Lordships therefore think that that is in this case the proper figure of damages.

As to costs their Lordships are of opinion that the decree as to costs in the court below should stand and that there ought to be no costs before this Board.

Their Lordships will therefore humbly advise His Majesty that the decree of the High Court in appeal should be varied by substituting Rs. 67,000 for the amount of the damages, and that otherwise it should be affirmed and this appeal dismissed, but without costs.

Solicitors for appellants: *Douglas Grant and Dold.*

Solicitors for respondents: *Lalley and Dawe.*

#### FULL BENCH.

Before Mr. Justice Sulaiman, Acting Chief Justice,  
Mr. Justice Mukerji and Mr. Justice Boys.

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July, 10.

BANKEY LAL AND OTHERS (DEFENDANTS) v. RAGHUNATH SAHAI AND ANOTHER (PLAINTIFFS) AND NAND GOPAL AND OTHERS (DEFENDANTS).\*

*Hindu law—Act No. IX of 1908 (Indian Limitation Act), articles 141, 144—Adverse possession—Suit by reversioners to recover property which was held adversely as against a Hindu female heir—Whether adverse possession against a Hindu female heir is adverse possession as against the reversioners.*

A Hindu widow, who had succeeded to the estate of her husband, died in 1894, leaving a daughter as the heir. The

\* First Appeal No. 362 of 1925, from a decree of Sheodarshan Dayal, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge of Agra, dated the 25th of July, 1925.

daughter, however, never got possession, as her father's collaterals took possession of the estate adversely to her. She did not sue them to recover possession and died in 1920. Her sons, who inherited the estate, sued these collaterals for possession in 1923. The defendants pleaded limitation by reason of their adverse possession for over 12 years, and the question arose as to what extent and under what circumstances adverse possession, as against a Hindu female heir, would bind the reversioners. *Held*,—

SULAIMAN, A.C.J., and MUKERJI, J.—Article 141, and not article 144, of the Limitation Act applied to the suit, which, having been brought within 12 years of the death of the daughter, was not barred by limitation.

No question of adverse possession arose in the *Shivagunga* case (1) and the rule in that case was not a rule of limitation or adverse possession, but a rule of Hindu law that the estate vested in a Hindu widow and that a decree against her, if fairly obtained, was binding on the reversioners. Even assuming that a rule of limitation had been laid down by that case, it must be deemed to have been superseded by the enactment of article 141 in the Limitation Act of 1877.

The case of *Vaithialinga Mudaliar v. Srirangath Anni* (2) did not lay down that article 141 of the Limitation Act was inapplicable to a suit like the present, or that the rule laid down in *Runchordas'* case (3) was no longer good law.

*Per* MUKERJI, J.—Adverse possession against a Hindu female heir will not be effective against and binding on the reversioners.

*Per* BOYS, J.—The rule in *Shivagunga's* case (1) which was affirmed in the case of *Vaithialinga Mudaliar* (2), at page 904 of I. L. R., 48 Madras, was the initial main rule,—that there are cases in which the widow represents the estate so that acts and omissions by her may bind the reversioners. No pronouncement was made, either formally or by way of *obiter dictum*, on the effects of adverse possession against the widow.

The correctness of the decision in *Runchordas'* case (3) was not in any way challenged or doubted in *Vaithialinga's* case (2), but the discussion of the former in the latter case

(1) (1863) 9 Moo. I.A., 539.

(2) (1925) I.L.R., 48 Mad., 883.

(3) (1899) I.L.R., 23 Bom., 725.

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does narrow the scope of *Runchordas'* case, showing that it is not, as it has been treated as being, authority for any broad proposition that a Hindu widow does not, in the matter of adverse possession, where there is no decree, ever so represent the estate that the reversioners will be bound by adverse possession running for 12 years against her.

The question whether a reversioner is barred by adverse possession against the widow on the basis that she represented the estate, thus coming within the main rule of *Shivagunga's* case, would probably have to be decided, as in the case of decrees, on the facts of the particular case.

The following cases were also referred to :—*Lachhan Kumar v. Manorath Ram* (1), *Ram Kali v. Kedar Nath* (2), *Amrit Dhar v. Bindesri Prasad* (3), *Jagadamba v. Dakshina Mohan* (4), *Hari Nath v. Mothurmohan* (5), *Saroda Soodury v. Doyamoyee* (6), *Srinath Kur v. Prosunno Kumar* (7) and *Tiki Ram v. Shama Charan* (8).

The facts of the case appear from the judgement of SULAIMAN, A.C.J.

Pandit *Shiam Krishna Dar* and *Munshi Baijnath Sahai*, for the appellants.

*Munshi Narain Prasad Asthana* and *Munshi Bhagwati Shankar*, for the respondents.

SULAIMAN, A.C.J. :—In this case Bansidhar, the last male owner, died in 1878 and was succeeded by his widow Musammat Gumane. Musammat Gumane died in 1894. On her death the estate devolved on their daughter Musammat Saraswati under the Hindu law, but Bansidhar's collaterals took possession of the estate and Musammat Saraswati never got possession. In her lifetime she never sued to recover possession. She died in 1920. The present plaintiffs are the sons of Musammat Saraswati and are, under the Hindu law, entitled to the estate in preference to the collaterals. The defendants are the representatives of the collaterals who

(1) (1894) I.L.R., 22 Cal., 445.

(3) (1901) I.L.R., 23 All., 448.

(5) (1893) I.L.R., 21 Cal., 8.

(7) (1883) I.L.R., 9 Cal., 934.

(2) (1892) I.L.R., 14 All., 156.

(4) (1886) I.L.R., 13 Cal., 308.

(6) (1880) I.L.R., 5 Cal., 938.

(8) (1897) I.L.R., 20 All., 42.

took possession of the estate in 1894, and some of the defendants are transferees from them.

The plaintiffs' suit was instituted in 1923, and they claimed that the cause of action in their favour accrued in 1920, when Musammat Saraswati the daughter died. Among other pleas the defendants raised the plea that the suit was barred by time. This plea was overruled by the court below and the claim was decreed. The defendants preferred an appeal to this Court, which came up for hearing before a Division Bench. In consequence of certain observations of their Lordships of the Privy Council in the case of *Vaithialinga Mudaliar v. Srirangath Anni* (1), the Bench has referred the following question to this Full Bench :—

“To what extent, if any, and under what circumstances will adverse possession, proved as against a Hindu female heir, bind the reversioners?”

Whenever any question of limitation is raised it leads to clear thinking if at the outset it is settled which article is applicable. The present case is governed by Act No. IX of 1908. On behalf of the plaintiffs reliance is placed on article 141, whereas the defendants' advocate relies on article 144. He also relies on the provisions of section 28 of the Limitation Act. It is conceded that no other article or section is applicable.

Now, apart from any rulings, article 144 cannot in terms apply if the suit is otherwise specifically provided for. It is a general article which is applicable when there is no other special provision. It is therefore clear that if the case falls within the terms of article 141, article 144 is wholly inapplicable, and the date when the defendants' possession became adverse would not be material. Now article 141 undoubtedly applies to a suit brought by a Hindu who is entitled to possession of immovable property on the death of a Hindu fe-

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male. The plaintiffs are Hindus and are governed by the Hindu law. Under that law they were entitled to possession of the estate on the death of Musammat Saraswati. The suit is brought after her death and within 12 years of it. *Primâ facie*, therefore, article 141 governs this case.

I do not attach any importance to the argument that the word "entitled" in this article necessarily means "entitled under the law and not extinguished by limitation." Similarly, I have no hesitation in repelling the argument that this article applies only to a suit brought by the first Hindu entitled to possession on the death of the first female heir. The contention is that limitation began to run under this article from 1894, the date of the death of Musammat Gurnee, not only against Musammat Saraswati, but also against all future reversioners. In my opinion, on the language of this article such a contention is wholly untenable. The period began to run against Musammat Saraswati in 1894, but there is a fresh period which started against the present plaintiffs on the death of Musammat Saraswati in 1920.

Now it must be borne in mind that the provision as contained in article 141 of the Limitation Act of 1908 did not find any place in the Limitation Act No. XIV of 1859. The first time when a similar provision was introduced was in Act No. IX of 1871. Article 142 of that Act was similarly worded, except that instead of the word "female" we had the word "widow". The word "female" was substituted in Act No. XV of 1877, article 141. That word has been repeated in the present Act.

There being no such provision in the Act of 1859, and the only section applicable being section I, clause (12), which was the general article for suits for recovery of immovable property, it is not surprising that the

courts held that adverse possession against a Hindu female for over 12 years extinguished the title of the reversioners completely. This was clearly laid down in the cases of *Goluckmonee Dabee v. Degumber Dey* (1), *Nobin Chunder v. Issur Chunder* (2) and *Aumirtolall Bose v. Rajoneekant* (3). The last-mentioned case, though decided by their Lordships of the Privy Council in 1875, had commenced even before 1859, and the question of limitation had to be determined according to the old law.

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After the passing of the Act of 1871, indeed after the coming into force of the Act of 1877, a Full Bench of this High Court in the case of *Ram Kali v. Kedar Nath* (4) held that article 141 was applicable to a suit brought after the death of a Hindu widow, and that limitation of 12 years ran from the date of her death.

After this came the Privy Council case of *Lachhan Kunwar v. Manorath Ram* (5). I shall discuss this case later on. After this pronouncement a Division Bench of this Court in the case of *Tika Ram v. Shama Charan* (6), without discussing the Privy Council case at any length, held that it had impliedly overruled the previous Full Bench case. Then came another Privy Council case, *Runchordas v. Parvatibai* (7), which also I shall discuss later.

After this last pronouncement a Division Bench of this High Court, in the case of *Amrit Dhar v. Bindesri Prasad* (8), held that the Full Bench case of *Ram Kali v. Kedar Nath* had not been overruled by their Lordships of the Privy Council in the case of *Lachhan Kunwar*. Since the case of *Amrit Dhar* the view which has consistently prevailed, not only in this High Court, but

(1) (1852) 2 Boulnois, 193.

(3) (1875) L.R., 2 I.A., 113.

(5) (1894) I.L.R., 22 Cal., 445.

(7) (1899) I.L.R., 23 Bom., 725.

(2) (1868) 9 W.R., 505.

(4) (1892) I.L.R., 14 All., 156.

(6) (1897) I. L.R., 20 All., 42.

(8) (1901) I.L.R., 23 All., 443.

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in all the other High Courts, has been that article 141 and not article 144 governs suits brought by Hindu reversioners who became entitled to the estate on the death of a limited female owner.

*Sulaiman.*  
A. C. J.

The facts in *Lachhan Kunwar's* case were as follows: Mangal Singh died in 1858, leaving a widow Jit Kunwar and a son Pahlad Singh. Pahlad Singh died in 1861, leaving a widow Lachhan Kunwar. There was no doubt that Lachhan Kunwar, although under the Hindu law she was entitled to the estate, never got possession. About the year 1875 Lachhan Kunwar sued Jit Kunwar to recover possession. This suit was admittedly dismissed on the ground that her claim was barred by limitation. In this suit Jit Kunwar had pleaded that she had held adverse possession over the property ever since Mangal Singh's death. On the death of Jit Kunwar, Lachhan Kunwar along with certain reversioners instituted a suit claiming possession against certain transferees from Jit Kunwar. It is obvious that Lachhan Kunwar, a Hindu female entitled to the estate, was herself one of the plaintiffs and was alive. Article 141 of the Limitation Act could therefore not possibly have been invoked by the defendants. It is also clear that the reversioners had no *locus standi* to sue unless they were entitled to come in as reversioners of Mangal Singh. The case put forward on behalf of the plaintiffs was that Jit Kunwar, when she remained in possession, acquired a Hindu widow's estate and did not become an absolute full proprietor, and accordingly on her death her limited estate devolved on the plaintiffs. Their Lordships held that having regard to the claim put forward by Jit Kunwar in the previous litigation, her possession had been that of an absolute full proprietor. This was the finding of the Judicial Commissioner which was accepted by their Lordships.

Assuming that Jit Kunwar's possession had not begun in the lifetime of Pahlad Singh, which perhaps was doubtful, Lachhan Kunwar's claim could not have been decreed as her previous suit had already been dismissed, and the reversioners could not have come in unless Jit Kunwar was holding merely a Hindu widow's estate. It is, therefore, obvious that this Privy Council case in no way overruled the previous Full Bench case of our High Court. It was wrongly thought in *Tika Ram's* case (1) that that case had been overruled.

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In *Runchordas'* case (2) the suit was brought, after the death of a Hindu widow, challenging the validity of the bequests of the last male owner. Two of the issues that were settled were whether the suit was barred by limitation, and whether the bequests were void. The High Court, both on the original and appellate side, held that the bequests were void but that the suit for immovable properties was not barred by limitation. Their Lordships of the Privy Council held that the objects of the bequests were too vague and uncertain for the administration of them to be under any control. Their Lordships then remarked: "It is therefore necessary to decide the question of limitation." They then proceeded to examine the provisions of Act No. XV of 1877, and laid down in unmistakable terms that article 144 is not applicable when the suit is otherwise specially provided for, and that the article applicable to a suit for possession of immovable property was article 141, and that for movables was article 120. Referring to the argument that under section 28 of the Limitation Act the right had been extinguished, their Lordships gave the answer that "the period limited was not determined".

This case has since then been the foundation of the applicability of article 141. It re-affirmed the view

(1) (1897) I.L.R., 20 All., 42.

(2) (1899) I.L.R., 23 Bom., 725.



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expressed in *Ram Kali's* case (1), and that view was never challenged till 1925. It was in that year that the judgement in the case of *Vaithialinga Mudaliar v. Sri-rangath Anni* (2) was delivered by their Lordships of the Privy Council, and we have to consider whether the effect of the observations contained therein is to overrule the previous case law. As there is some difference of opinion amongst us, I must consider this Privy Council case at some length.

Arunachala was the last male owner, who died in 1849, leaving a widow Chokkammal. Chokkammal purported to adopt Arunachala's brother, whose widow Murugathal, in her turn, adopted his nephew. On the death of this nephew Murugathal claimed to succeed as a Hindu female. On the other hand, if there was no valid adoption the Hindu widow's estate remained in Chokkammal. From the year 1862, when the adoption had taken place, Chokkammal was out of possession till 1884, when Murugathal was in possession as the adoptive mother. In that year Chokkammal forcibly dispossessed Murugathal. In 1887 Murugathal sued Chokkammal, setting up the adoption. It was admittedly held that the adoption was invalid, and Murugathal's suit was decreed on the finding that there had been adverse possession for over 12 years against Chokkammal. On Chokkammal's death in 1902, the reversioners to the estate of Arunachala sued in 1905 for possession. The pleas raised in defence were those of *res judicata* and limitation. The High Court at Madras held that the principle of *res judicata* did not apply, but that the suit was barred by limitation.

After setting forth the facts of the case and quoting from Mr. Mayne a passage to explain the position of a Hindu widow, their Lordships remarked that she represents the estate in suits brought by her or against her

(1) (1892) I.L.R., 14 All., 156.

(2) (1925) I.L.R., 48 Mad., 883.

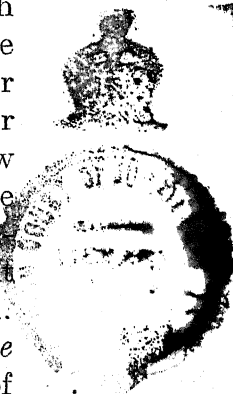
for possession of the estate or any part of it, and she and the reversioners are equally bound by a final decree in a suit fought out according to law, which is not collusive or fraudulent. Their Lordships then remarked that in the litigation of 1887, although Chokkammal was personally interested in defeating Murugathal's claim, she did, in fact and in law, in that suit represent the estate as well as her own interests as a Hindu widow. Their Lordships then referred to the protracted argument which had been submitted to the Board as to whether adverse possession against a widow in possession of an estate for a Hindu widow's interest bars a reversioner. Their Lordships remarked that it was not necessary in the view which would be later announced by the Board on the question of limitation, to make any formal pronouncement upon this point, and their Lordships thought it convenient to refer to the authorities that had been cited. Their Lordships first referred to the case of *Goluckmonee Dabee v. Degumber Dey* (1) and then to the case of *Nobin Chunder v. Issur Chunder* (2), both of them being cases decided before the Limitation Act of 1871. Their Lordships then quoted the well-known passage from the case of *Katama Natchiar v. Rajah of Shivagunga* (3), which has been described as laying down the 'rule in *Shivagunga's* case'. No doubt for the purpose of that case it was not absolutely necessary to lay down that rule, but there is no doubt that that rule was laid down after full consideration, and that rule has been applied since then.

Inasmuch as there has been considerable controversy as to the exact rule which was laid down in *Shivagunga's* case in the passage quoted at page 894, I must point out that all that was remarked in that passage was that the whole estate for the time vests in a Hindu widow

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(1) (1932) 2 Boulnois, 193

(2) (1868) 9 W.R., 505.

(3) (1868) 9 Moo. I.A., 539.

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absolutely for some purposes, though, in some respects, for a qualified interest, and that the principle which has prevailed in England "as to tenants in tail representing the inheritance would seem to apply to the case of a Hindu widow, and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow." It is noteworthy that there is no express mention of adverse possession against a widow being good as against the reversioners, nor is there any clear reference to any rule of limitation. Their Lordships, after quoting the passage, then describe it as "the declaration as to Hindu law". I am therefore wholly unable to accept the contention on behalf of the appellants that the rule laid down in this passage was the rule that adverse possession against a Hindu widow for over 12 years extinguishes the rights of the reversioner. The only rule laid down was that a *bonâ fide* decree against her was binding on the reversioners and this is the rule which must be taken to be mentioned when an expression like the 'rule in *Shivagunga's* case' is used.

At the Bar the passage quoted from *Shivagunga's* case had been actually objected to on the ground that it was *obiter*. Their Lordships accordingly considered it necessary to refer to cases showing that the doctrine there set forth was in accordance with the course of judicial decisions.

They first referred to the case of *Nobin Chunder v. Issur Chunder* (1) which was undoubtedly one where a trespasser had taken adverse possession of the estate against the widow. The passages quoted from the judgments of the learned Judges of the Full Bench certainly show that they held that the possession held adversely against the widow was adverse against the reversioner.

(1) (1863) 9 W.R., 505.

but this inference was supposed to follow from the rule in *Shivagunga's* case that a decision fairly arrived at without fraud or collusion in the presence of a Hindu widow in possession bound the reversioner.

The decision of the Full Bench was cited and affirmed in the case of *Aumirtolall Bose v. Rajoneekant* (1), but in order to appreciate the effect of those remarks it is necessary to bear in mind the fact that those cases were decided before Act No. IX of 1871 was passed. In the absence of any provision similar to that now contained in article 141, I may with respect say that it was the only conclusion to which the courts could come.

Their Lordships then referred to the cases of *Jugul Kishore v. Jotendro Mohun Tagore* (2), *Pertabnarain v. Trilokinath* (3), and *Hari Nath v. Mothurmohun* (4), where the question of adverse possession did not arise, but in two of them decrees had been obtained against the widow. Their Lordships quoted the remark of Lord WATSON that before a reversionary heir could sue within 12 years from the time that his right to possession accrued, he "must show that the new law gives a right of action to a reversioner notwithstanding that the widow's right of possession had been extinguished by the decree." Their Lordships then discussed the case of *Risal Singh v. Bulwant Singh* (5). There the widow had first brought a suit for a declaration that an alleged adoption by her of Bulwant Singh was wholly void and ineffectual. The High Court held that she was personally estopped from challenging the adoption and dismissed the claim. Their Lordships of the Privy Council affirmed that decree in 1912. On the widow's death the reversioner Risal Singh sued Bulwant Singh again for possession of the property. Their Lordships, affirming the view of BANERJI, J., held: "Rani Dharam Kuar in

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(1) (1875) I.L.R., 2 I.A., 113.

(2) (1884) I.L.R., 10 Cal., 985.

(3) (1884) I.L.R., 11 Cal., 186.

(4) (1893) I.L.R., 21 Cal., 8.

(5) (1912) I.L.R., 40 All., 593.

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her suit against Bulwant Singh did, notwithstanding the personal estoppel under which she laboured, represent the estate on the question of fact as to whether Bulwant Singh had or had not been validly adopted and that she represented the estate within the meaning of the rule in *Katama Natchiar v. Raja of Shivagunga*." Thus the binding character of a decree against the widow was re-affirmed.

At the Bar it was apparently argued that the rule in the *Shivagunga* case had not been universally applied, and it was asserted that that principle might have been applied and had not been applied in the case of *Runchordas v. Parratibai* (1). Their Lordships proceeded to consider the facts of *Runchordas*' case and pointed out that the main question was as to the gift for charitable purposes being void for vagueness and uncertainty. Their Lordships did not quote the discussion of the Limitation Act in *Runchordas*' case, which I have quoted above, but quoted a passage where the Board had remarked that it was not necessary to consider what might have been the case if the widows had themselves been suing. The final conclusion at which their Lordships arrived is at page 903: "It does not appear to their Lordships how the rule in *Shivagunga* case could have been applied in the case then before the Board." The facts in the case of *Runchordas* undoubtedly made the rule in the case of *Shivagunga* inapplicable. There was accordingly nothing in the argument that that might have been applied and was not applied.

Having considered all these cases, their Lordships remarked at page 904: "The result of the case to which their Lordships referred shows, in their opinion, that the Board has invariably applied the rules of the *Shivagunga* case as sound Hindu law where that rule was applicable." Their Lordships again repeat the expression

(1) (1899) I.L.R., 23 Bom., 725.

"sound Hindu law". I therefore take it that no question of limitation or adverse possession was included in that rule. Had their Lordships intended to lay down that the result of the authorities was that adverse possession against a Hindu widow was good adverse possession against a reversioner their Lordships would, in the next sentence, have held that that suit was barred by article 144 of the Limitation Act. But their Lordships avoided saying so.

On the other hand they proceeded to consider the effect of article 129 of Act No. IX of 1871, and remarked that it had been held in the case of *Jagadamba v. Dakkhina Mohun* (1) that that article related to all suits in which the plaintiff cannot succeed without displacing an apparent adoption by virtue of which the defendant is in possession. Their Lordships then held that Act No. IX of 1871 did not give to a reversioner, whose right to sue for possession accrued upon the death of a Hindu widow, any further time than the 12 years which was given by article 129 of that Act. They then remarked that the period of limitation allowed by that article expired in 1874 and before Act No. XV of 1877 came into force. Article 129 of the Act of 1871 prescribed 12 years for a suit to establish or set aside an adoption. Such a provision was omitted from the Act of 1877. In lieu of it article 118 was introduced which governed declaratory suits. Their Lordships of the Privy Council held that time had run out before 1877 under article 129, which was applicable because the plaintiff could not sue for possession without displacing the apparent adoption. Thus their Lordships disposed of the case on a ground totally different from the plea that adverse possession against the widow was adverse possession against the reversioner.

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(1) (1886) I.L.R., 13 Cal., 308.

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Further, if their Lordships had intended to lay down finally that a decree against a widow based on adverse possession only was binding on the reversioners, their Lordships would have at once remarked that the suit before them was barred by the principle of *res judicata*, for in that case a decree had been obtained against Chokkammal on the basis of the adverse possession of Murugathal. But their Lordships refrained from deciding that point, and at page 905 considered it unnecessary to express any opinion on the application of the principle of *res judicata*.

On an examination of the judgement, it is clear to my mind that their Lordships did not lay down that article 141 of the Limitation Act was inapplicable or that the rule laid down in *Runchordas'* case, which had affirmed the view of this Court in the case of *Ram Kali* (1), was no longer good law.

I have so far discussed this case on my view that the rule in *Shivagunga's* case was not a rule of limitation or adverse possession, but a rule of Hindu law or procedure that the estate vested in the widow and that a decree against her, if fairly obtained, was binding on the reversioners. Even if I were to assume, which I by no means do, that the rule in *Shivagunga's* case was a twofold rule, relating both to the binding character of a decree against the widow and the adverse possession against her being good as against the reversioners, I fail to see why the Legislature cannot, by a subsequent amendment of the Limitation Act, destroy the effect of one part of the rule, while leaving intact the other part. There is nothing illogical in that. By the enactment of article 141 the Legislature has undoubtedly given 12 years to reversioners from the death of the female. This was obviously to remove a great hardship which reversioners suffered. While the widow was alive they could

(1) (1892) I.L.R., 14 All., 156.

not compel her to recover possession from trespassers, nor could they sue for a declaration of their title against such trespassers (excluding those deriving title under an alienation by a widow). Their rights before 1871 used to be extinguished completely after the lapse of 12 years and they were helpless in the matter. It was to remove this difficulty that the Legislature intervened. The rule of limitation, even assuming that such a rule was laid down in *Shivagunga's* case, must be deemed to have been superseded by the enactment in the Limitation Act. That part of the rule can no longer be said to be in force. Of course, I have endeavoured to explain that in my opinion the rule in *Shivagunga's* case was not a rule of limitation or adverse possession at all, and on that view I maintain that the rule in *Shivagunga's* case is still applicable, but that it does not touch the present case.

My answer to the question referred to us is that where a widow has entered into possession as a Hindu widow and has either voluntarily parted with possession or been dispossessed against her consent, a suit by the reversioner brought for possession after her death is governed by article 141 and not by article 144, and having been brought within 12 years of the death of Mst. Saraswati, is not barred by limitation.

MUKERJI, J.:—This is a reference to the Full Bench by a Division Bench of this Court for the decision of a question which has been formulated in the following language :

“To what extent, if any, and under what circumstances will adverse possession, proved as against a Hindu female heir, bind the reversioners?”

The facts behind this reference briefly are these. One Bansidhar died in 1878, leaving considerable property. He was succeeded by his widow Musammat

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Gumano, who died in 1894. On her death her daughter, Saraswati, succeeded to her father's property, but she did not take possession of a portion of the property, although the same was in her mother's possession when she died. Saraswati died in 1920, and in 1923 the plaintiffs (her two sons) claimed the property. It has been argued on behalf of the defendant that his possession between 1894 and 1920, having extended for over 12 years, extinguished Saraswati's right to the property and, therefore, the plaintiffs' right to the same. The case of *Vaithialinga Mudaliar v. Srirangath Anni* (1) has been relied upon for the defendants.

Article 141 of the Limitation Act of 1877 was in force when Bansidhar died. This rule of law has remained unchanged up to this date, although the Act No. IX of 1908 has displaced the older Act of 1877. Article 141 of the Limitation Act of 1877 read as follows:—

Like suit for possession of immov-	12 years	When female
able property by a Hindu or		dies.
Muhammadan entitled to the		
possession of an immovable		
property on the death of a		
Hindu or Muhammadan female.		

Article 141 of schedule 1 of Act No. IX of 1908 is exactly in the same language. Under the law, therefore, as it stands, the present suit is by a Hindu, for possession of immovable property, instituted on the death of a Hindu female, and by one claiming to be entitled to possession on the female's death. The cause of action would arise on the death of the female, provided, of course, the plaintiffs are entitled to possession. The title referred to in the first column of article 141 must be a title existing apart from the question of limitation. For, it is a rule of limitation that is being provided by article 141 and there could be no benefit in providing a rule, if it is to be said that "the suit can be maintained

(1) (1925) I.L.R., 48 Mad., 893.

only if the plaintiff is not barred by time." To put the same thing in other words, if 12 years have been provided for a suit by a Hindu, entitled under the Hindu law to succeed to the property on the death of a Hindu female, it must be held that the suit is within time whenever the suit is within 12 years of the death of the female. It may be that the claimant is barred on some ground other than the ground of limitation. For example, his claim may be barred because he has sold away his rights before the institution of the suit or he may be barred, say, by any previous litigation, although he was himself no party to it. On the face of the existing law, therefore, it must be taken that the plaintiffs' suit must be within time because it has been instituted within 3 years of Saraswati's death and the plaintiffs' right to sue accrued, under the Hindu law, on the death of their mother.

This being undoubtedly the law, as read without the assistance of any authority, we have to see whether the case in I. L. R., 48 Mad., 883, quoted above, has ruled otherwise.

Before we examine the case mentioned, it will be interesting to see what was the law of limitation before the Act of 1877 came into force. An earlier Act on limitation was Act No. IX of 1859. It was a short Act and provided a rule of 12 years for suits for recovery of possession of immovable property and the starting point of limitation was the rise of the cause of action. Under this state of the law, an adverse possession, started against a Hindu female in possession of property as an heir to the last male owner, will necessarily bar a reversioner's suit if the possession has continued for more than 12 years. This is important to bear in mind. When the Act of 1871 (Limitation) came into force, an article was introduced which gave the reversioner 12 years to

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sue, from the date of the death of the Hindu widow of the last male owner. It did not lay down what would be the case where a daughter was in possession. Then came into operation Act No. XV of 1877 and I have already quoted the provision of that Act.

The case of *Runchordas v. Parvatibai* (1) was decided by their Lordships of the Privy Council when Act No. XV of 1877 was in force. In this case on the death of certain ladies, the widows of the last male owner, a claim for recovery of possession was made against certain persons who were in possession under an invalid document executed by the last male owner. It was argued that if the ladies had been alive and had sued for recovery of possession, they would have been barred by the adverse possession of the defendants and that, therefore, the claim by the plaintiffs would also be time barred. Their Lordships of the Privy Council pointed out two things. They pointed out that article 141 of the Limitation Act applied to the case and that the plaintiffs were claiming, not through the widows of the last owner, but through the last male owner himself. This case was taken to settle for India the law, and to lay down that a suit by a Hindu reversioner for recovery of property, on the death of the last female heir, was governed by article 141 of the Limitation Act of 1877.

The question now is whether their Lordships of the Privy Council in the case of *Vaithialinga Mudaliar v. Srirangath Anni* (2) have said any thing by which we are to understand that they were laying down a contrary law.

It would be necessary to examine the facts in the aforesaid Madras case. Briefly, the last male owner Arunachala died in 1849, leaving a widow Chokkammal

(1) (1899) I.L.R., 23 Bom., 725.

(2) (1925) I.L.R., 48 Mad., 883.

who lived till 1902. The widow of Arunachala adopted her husband's younger brother Alagusundara. The adoption could not be valid under the Hindu law, because at the date of the adoption, Alagusundara's parents were dead and there was nobody to give him away in adoption. Alagusundara, however, was put in possession and died in 1864, 2 years after his adoption. He left him surviving a widow Murugathal, who adopted Thiagaraja. Thiagaraja died in 1881, leaving a widow who died in 1882. Thiagaraja, and after him his widow, were in possession, and on the former's death his widow's name was recorded. The widow having died in the year 1882, the adoptive mother of Thiagaraja took possession of the property, for a Hindu mother's estate, (in the judgment, "widow", see p. 890), but was ejected in 1884 by Chokkammal, her mother-in-law. Murugathal, the daughter-in-law, thereupon brought a suit for possession of the property in 1887 against her mother-in-law, and although it was found that, for the reasons given above, the adoption was bad, the suit was decreed on the ground that the plaintiff and her predecessors in title had acquired a title to the property by adverse possession against Chokkammal. It was found that the suit of 1887 was a genuine suit and not a collusive one and was regularly fought out in the courts. Three years after the death of Chokkammal, the reversioners to the estate of Arunachala, (his brother's sons), brought the suit for recovery of the property against persons who were in possession under Murugathal.

The suit was dismissed by the courts in India and their Lordships of the Privy Council upheld the decree on the sole ground that it was barred by limitation because article 129 of the second schedule of Act No. IX of 1871 applied to the case. It appears that under the law in force when Alagusundara was adopted, it was

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necessary for any body who disputed the adoption to bring a suit within 12 years of the adoption, and in the case of a failure to bring such a suit, any subsequent suit to claim the property on the displacement of the adoption used to be held as time-barred. It will be remembered that the adoption of Alagusundara took place in 1862 and no suit to contest it was brought within 12 years of the adoption. The adoption, therefore, stood in the way of the plaintiffs' success. This was the sole ground on which the decree of the courts in India was actually upheld by their Lordships of the Privy Council.

Two other questions were argued before their Lordships and they were, firstly, that the adverse possession of Alagusundara and his successors in title, being against Arunachala's widow Chokkammal and having extended for over 12 years, was effective enough to bar out the reversioners of Arunachala. The second point argued was that the decision obtained by Murugathal against Chokkammal in the litigation of 1887 operated as *res judicata* against the plaintiffs. Their Lordships expressly professed not to decide either of the two points. At p. 905 of the report, dealing with the question of *res judicata*, their Lordships say:—"On that subject their Lordships do not consider it necessary to express an opinion." Dealing with the argument of adverse possession their Lordships say, at p. 893:—"A protracted argument was submitted to the Board on the question whether, under Hindu law, adverse possession against a widow in possession of an estate for a Hindu widow's interest bars the reversioner. While it is not necessary, in the view which will later be announced by the Board on the question of limitation in this case, to make any

formal pronouncement on this point, it may be convenient to say that the authorities referred to were as follows." Having expressly stated that their Lordships would not make any formal pronouncement on the question of the effect of adverse possession against a Hindu widow, their Lordships quoted two cases where it was expressly held by the Calcutta High Court that adverse possession against a widow was adverse possession against the reversionary heir. Then their Lordships quoted several other cases in which there was no discussion as to the question of adverse possession but there was a discussion as to how far a judgement obtained against a widow was binding on the reversionary heir. As they had already stated, their Lordships, after concluding the review of the cases, did not pronounce any opinion as to the effect, as against the reversioner, of adverse possession against the widow. It appears that at their Lordships' Bar, the case of *Katama Natchiar v. Rajah of Shivagunga* (1) was quoted to establish that under the Hindu law a widow represented not only her qualified interest in the estate but also, for most purposes, the absolute estate. Evidently, the reason for the quotation of this proposition was that if the widow was representing the estate, she was representing it when a stranger had trespassed and was holding adversely and that, therefore, by completion of 12 years' adverse possession the trespasser would have a title not only against the widow but also against the reversioner. When the case of *Katama Natchiar* was quoted at their Lordships' Bar, the other side argued that the declaration of Hindu law by their Lordships in that case was an *obiter*. Their Lordships, thereupon, quoted cases (of two classes already mentioned) to show that although it was the case that the dictum was *obiter*, it had been followed in subsequent cases. At the top of p. 895 of the report their

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Lordships say:—"The following cases, however, were referred to as showing that the doctrine there set forth was in accord with the course of Judicial decisions." Having said so, their Lordships considered certain cases (from p. 895 to the top of p. 904) and concluded, in the first paragraph at p. 904, as follows:—"The result of the cases to which their Lordships have referred shows, in their opinion, that the Board has invariably applied the rule of the *Shivagunga* case as sound Hindu law where that rule was applicable."

It was argued before us that although their Lordships did not profess to decide the effect of adverse possession and although the "result" quoted at p. 904 was the result, viz., that the rules of the *Shivagunga* case had been applied as sound Hindu law, it must be taken that their Lordships, by necessary implication, were deciding the effect of adverse possession against a Hindu widow.

To rightly understand this argument we shall have to see, first, what was the dictum in *Katama Natchiar's* case which was quoted by their Lordships and what were the cases they relied upon. In *Katama Natchiar's* case there was no question of adverse possession. The question arose whether a decree obtained against a widow would or would not bar the reversioner from re-agitating the subject matter of the decree. Their Lordships remarked:—"For assuming her to be entitled to the zamindari at all, the whole estate would for the time be vested in her absolutely for some purposes, though, in some respects, for a qualified interest. . . . It is obvious and there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow."

It will be noticed, as I have already said, there was no question of adverse possession against a Hindu widow.

Their Lordships laid down, as they themselves say, by the dictum a declaration as to Hindu law, namely, that a widow for some purposes absolutely represented the estate and, in some respects, a qualified interest. In the case of a litigation, their Lordships further laid down, the widow would represent the entire estate, if the decree was fairly and properly obtained against her. It was on this statement of law, viz., the widow represented the estate "absolutely for some purposes", that the argument was sought to be built that adverse possession against a widow would be adverse possession against the estate itself, so as to bind the reversioners after the death of the widow. To support this argument two cases from the Calcutta High Court were cited, where it was held, on the basis of this dictum, that adverse possession against a widow was adverse against the entire estate. In *Nobin Chunder v. Issur Chunder* (1) the opinion was expressed by some of the learned Judges that it followed from the dictum in the *Shivagunga* case that adverse possession against a widow was adverse possession against the reversioner claiming the full estate. All the other cases quoted related to litigations to which the widow was a party.

It will be observed that the Calcutta cases were decided under the law as it stood under Act No. XIV of 1859 and that Act did not provide for any separate rule for reversioners. When there was a trespass against a widow, a suit had to be brought within 12 years of the date of the commencement of trespass, no matter whether the suit was by the widow or by the reversioner. The Calcutta cases were therefore rightly decided (with all respect) under the then existing law. The other cases quoted at their Lordships' Bar in *Vaithialinga Mudaliar's* case (2) were cases in which a widow was a party to decrees. The dictum in the *Shivagunga* case, I must

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(1) (1868) 9 W.R., 505.

(2) (1925) I.L.R., 48 Mad., 883



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again point out, related to a decree alone and was absolutely silent as to adverse possession. Their Lordships never indicated in that case whether, in the case of adverse possession against a widow, she would represent the estate "absolutely" or "for a qualified interest". If, therefore, the *Shivagunga* case never said anything as to the effect of adverse possession against a widow, can we say that, by affirming the principle laid down in that case, their Lordships, by necessary implication, supported the argument (as to which they expressly refrained from pronouncing any opinion) that in the case of adverse possession the widow represented the whole estate? No body had the courage to argue that a widow, by making a transfer without legal necessity, could bind the reversioner. If she could not bind by an overt act, how can it be said that she could bind the reversioners, either by her laches (in allowing a trespasser to take possession of property and not trying to recover it) or even by an attempt which did not amount to a claim in court within the purview of the dictum in the *Shivagunga* case?

Let us assume, for a moment, that a necessary result of the dictum in the *Shivagunga* case was that adverse possession against a widow would operate as such against reversioners, however late they might come, and although they had no interest in the property in the lifetime of the widow. Is it not open to us to suppose that the Legislature intervened and by enacting article 142 in 1871 and article 141 in 1877 and 1908 (in the Limitation Acts) nullified the effect of that dictum? When the Legislature expressly says that a reversioner is entitled to maintain a suit for possession of the immovable property within 12 years of the death of the female heir, is it open to anybody to say that the reversioner would be entitled, provided his title is not already lost by adverse possession? Loss of title by adverse possession is a

question of limitation and is dealt with by the statute of limitation. What, then, would be the necessity of making a rule of limitation and saying that a man has 12 years' time from a particular date, if we are to add, "provided he is not barred by time"?

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Mukerji, J.

Going back then to the case in I. L. R., 48 Madras, can we take it that their Lordships held by implication (admittedly not expressly) that the reversioners were barred by limitation, even before their title to the property accrued? It is noteworthy that their Lordships in the I. L. R., 48 Madras case, did not even refer to article 141 of the Limitation Acts of 1877 and 1908. Are we, then, to assume that their Lordships of the Privy Council and the learned counsel at the Bar were ignorant of the existence of these provisions of the Indian law relating to a suit by a reversioner? The obvious answer is, their Lordships were answering the only question that they did answer, after pages of consideration of authorities, namely whether the dictum in the *Shivagunga* case was good or bad law. They never professed to decide and they never even by implication decided the question of limitation based on adverse possession.

The case of *Runchordas* (1), referred to above, in which a question of limitation had been decided was cited before their Lordships. While they pointed out that that case never afforded an occasion for the application of the dictum in the *Shivagunga* case, their Lordships said nothing on the question of limitation. This supports my view that the question of limitation, as based on adverse possession, was not being discussed.

For the foregoing reasons I am of opinion that the answer to the question propounded to us would be that "adverse possession against a Hindu female heir will not be effective against and binding on the reversioners."

(1) (1899) I.L.R., 23 Bom., 725.

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BOYS, J. :—The question referred to us by a Division Bench is broadly stated thus :—

“To what extent, if any, and under what circumstances will adverse possession, proved as against a Hindu female heir, bind the reversioners?”

The question was intended, and has been so considered by us, to be limited to the case of mere adverse possession where no decree had been obtained against the widow.

It has for some years past, i.e., since the decision of their Lordships of the Privy Council in *Runchordas v. Parvatibai* (1), been considered that time did not begin to run against the reversioners, where there was mere adverse possession (i.e., and no decree) against a Hindu female heir, until the death of the lady when the reversioners became entitled to possession,—reference of course being made to article 141 of the Limitation Act.

On April 2nd, 1925, however, the case of *Vaithialinga Mudaliar v. Srirangath Anni* (2) was decided and in that judgement there are at great length certain observations of their Lordships which, in the opinion of one of the members of the Division Bench that referred this case, called for serious consideration in the connection just mentioned.

Broadly speaking, the preliminary question then arises : “Do the observations of their Lordships throw any doubt on the correctness of the decision in *Runchordas*’ case, or, though not throwing doubt on the correctness of the decision in the particular circumstances of that case, do the observations, while deliberately refraining from indicating what might be the decision in other sets of circumstances, indicate that too wide a scope has been given to that case in the cases that purport to have

(1) (1899) I.L.R., 23 Bom., 725.

(2) (1925) I.L.R., 48 Mad., 883.

followed it and, if so, what effect should be given to those observations?"

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The observations are on the face of them *obiter dicta*, but as was remarked in the referring order of one of the Judges (myself):—"The value to be attached to an *obiter dictum* may be very slight indeed where it is thrown out in passing and where the authority pronouncing it is not one of the highest, or at any rate higher, jurisdiction. In other cases the pronouncement, though in form *obiter dictum*, may have been reached after very full consideration, and it may be one pronounced by the very highest authority. In such cases there can be no question as to the respect with which it must be treated. In the present case both these characteristics are present." Neither of my learned brothers sitting with me to hear this matter would, of course, dissent from the above proposition, but as they place a different interpretation on those observations it is necessary for me to state the view that I take.

The contention for the appellants before us was that the observations of their Lordships (at pp. 893—904 of I. L. R., 48 Madras), do by implication throw doubt on the correctness of the decision in *Runchordas'* case. At the hearing I was disposed to feel that there was some force in this contention, but a careful analysis of the whole case leaves me unable to accept it.

But that same analysis leads me to the conclusion that, while the correctness of the decision on the particular facts of the case was not doubted, their Lordships did very clearly and upon a very full consideration of the case state a view of it which suggests very strongly that the case was only a decision upon the particular facts therein and is not, as it has in India been taken to be, authority for the general proposition that in the matter of mere adverse possession, where it has not culminated in

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a decree, the Hindu female heir does not represent the estate.

The argument and my analysis suggest that five questions call for an answer:—

Boys, J.

1. What was the rule in *Shivagunga's* case which their Lordships declared at p. 904 to be sound law which had always been applied where applicable?

2. Does the conclusion at which their Lordships arrived in regard to that rule in any way challenge the correctness of the decision in *Runchordas'* case?

3. Does the discussion of *Runchordas'* case, in particular at pp. 901 to 904, suggest that that case was wrongly decided?

4. Does the discussion of *Runchordas'* case, though not suggesting that the case was wrongly decided, in any way narrow the scope which has hitherto been attributed to that decision in India?

5. In cases where it is pleaded that adverse possession against the widow binds the reversioner, by what principles should the answer be governed?

The fifth question is a paraphrase of the actual question referred to us, but it was not argued by counsel for the appellant, on it becoming apparent that the majority of the Bench were against him on the first three questions.

The first three questions were not separately framed at the hearing; but counsel for the appellant dealt with them by a broad argument that generally the effect of the discussion of the authorities by the Board was to cast doubt on the correctness of the decision in *Runchordas'* case.

The fourth question, as one quite distinct from the second and third, was not argued by counsel. I do not think I am doing any injustice to anybody, and certainly

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not to myself, when I say that I do not think the distinction between the second and third questions on the one hand and on the other the fourth was present to anybody's mind at the hearing; the distinction had not emerged and so the fourth question was not argued or discussed. But the distinction is important, the fourth question does arise and I will answer it.

I will deal with the five questions seriatim.

As to the first question, what was the rule approved at p. 904, it was urged that, while their Lordships declined to make any formal pronouncement on the effect of adverse possession, they did state, as the result of their examination of certain cases, their opinion that the rule in *Shivagunga's* case had never been doubted, that "the rule" to which they referred was understood by them to be a rule wide enough to include the proposition that in the case of mere adverse possession the widow represented the estate, that the fact that their Lordships were particularly considering this last proposition and whether it was included in the rule in *Shivagunga's* case is indicated by the fact that their Lordships referred to cases in which (be it under an early Limitation Act) there was mere adverse possession and no question of a decree, and further by the fact that they did not dismiss *Runchordas'* case with the simple observation that it was not a case of a decree, that therefore doubt had been thrown on the correctness of the decision in *Runchordas'* case.

I will endeavour to state how the observations in question present themselves to me.

It is unnecessary to state all of the facts of *Vaithialinga's* case. Three questions arose which their Lordships might have thought it desirable to decide, two relating to limitation and one relating to so-called "res judicata".

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The first was a question of the effect, by reason of limitation, of an adoption having remained unchallenged. The second was a question of '*res judicata*', founded on a decree obtained against the widow. The third raised another question of limitation, how far 12 years' adverse possession against a Hindu female heir barred the reversioners. It is the third with which we are concerned.

It may be taken as beyond doubt that their Lordships decided the case on the issue of limitation based on the adoption not having been challenged within the period provided by article 129 (p. 904).

It may also be taken as beyond doubt that they refused to decide the question of *res judicata* based on the decree obtained against the widow (p. 905).

Their Lordships' judgement began at p. 888 with a statement of the facts of the case. At p. 892 they began to consider the general position of a Hindu widow, and at the top of p. 893 they state the proposition that the Hindu widow 'represents the estate in suits brought by or against her for possession of the estate or any part of it, and she and the reversioners are equally bound by any final decree which a court makes in such a suit, provided that the suit was fought out according to law and was not collusive or fraudulent'. They then briefly hold that the suit which had been fought out between the widow and a trespasser had been *bonâ fide* contested by the widow and that in that suit she had represented the estate. But their Lordships did not hold that the reversioners were bound by the decree obtained against the widow. As I have already noted, they did not decide the question of *res judicata*.

On the same page 893, after this brief statement of the law, they next referred to 'a protracted argument on

the question whether under Hindu law adverse possession against a widow in possession of an estate for a Hindu widow's interest bars the reversioner." They continue: "While it is not necessary in the view which will later be announced by the Board on the question of limitation" (i.e., based on article 129) "to make any formal pronouncement upon this point, it may be convenient to say that the authorities referred to were as follows." They then refer to a number of cases from 1852 to 1918 and conclude, after ten pages of discussion of these cases, by finding "The result of the cases to which their Lordships have been referred shows, in their opinion, that the Board have invariably applied the rule of the *Shivagunga* case as sound Hindu law where that rule was applicable."

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The question, in regard to this formal declaration of opinion, is what was the rule in *Shivagunga's* case which the Board was approving "as sound Hindu law where that rule was applicable."

As a preliminary to answering this question it is essential to understand how the Board came to consider the point at all. Counsel for the plaintiffs appellants (p. 885) had to displace a finding of the High Court that the reversioners appellants were barred by article 129 of the Limitation Act and he attacked that finding; he relied on article 141 of the Limitation Act; he contended that adverse possession against the widow did not bar the reversioners; and he relied on *Runchordas'* case. Counsel for the defendants respondents (p. 886) contended that the reversioners were barred by article 129 of the Limitation Act; and secondly that the principle of *Shivagunga's* case was not limited to the particular decision in that case, the effect of a decree based on title; and he distinguished *Runchordas'* case on the ground that it was a case of mere adverse possession and in it



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there was no question of a decree based on adverse possession. Counsel for the plaintiffs appellants, in his reply (p. 887), in dealing with *Shivagunga's* case, had not to displace merely the particular decision in that case that a decree based on title bound the reversioners, for there was no such decree against him; he had not to displace any decision in *Shivagunga's* case that every decree, whatever it was based on, barred the reversioners, for there was no such decision in *Shivagunga's* case. He had to discredit the main rule of *Shivagunga's* case that there were cases in which the widow represented the estate, for if that main rule were accepted it opened the way to argument that a decree based on title was only an illustration and that a decree based on adverse possession and even mere adverse possession were within that rule. He, therefore, contended firstly (p. 887) that *Shivagunga's* case only concerned decrees based on title, and, further (pp. 894, 895), that the main rule declared in *Shivagunga's* case that there were cases in which the widow represented the estate was *obiter*. He again relied on *Runchordas'* case to show that mere adverse possession would not bar the reversioners, and contended that the fact that the Board had not held the reversioners bound in that case by applying the rule of *Shivagunga's* case showed that the rule in *Shivagunga's* case was discredited.

It is apparent, then, that there was a strenuous contest between the two counsels, not only on the effect of article 129 of the Limitation Act, but as to all the aspects of adverse possession whether culminating in a decree or not, and particularly as to the effects of the cases of *Shivagunga* and *Runchordas*. And we note the effort of counsel for the appellant to get rid of *Shivagunga's* case altogether as *obiter*, supported by the contention that the rule of that case had not been applied in *Runchordas'* case.

We have seen, then, what form the discussion took which led to their Lordships saying that "a protracted argument was submitted to the Board on the question whether under Hindu law adverse possession against a widow in possession of an estate for a Hindu widow's interest bars the reversioner." The Board, having heard a protracted argument on the question of the effect of adverse possession, proceeds to say that, though they will not make any formal pronouncement, it may be convenient to discuss some of the authorities referred to. It was suggested in argument, and on this much of it turned, in this Court, that in using the word "adverse possession", when speaking of the question on which they declined to make a formal pronouncement, their Lordships meant only "mere adverse possession" (unsupported by any decree), and that, therefore, the ensuing discussion in connection therewith and the rule of *Shivagunga's* case finally approved must also have concerned particularly the effect of mere adverse possession. But our consideration of the arguments addressed to the Board shows that the whole field as to the effects of adverse possession, whether culminating in a decree or not, was covered in the argument. The refusal to make a formal pronouncement, then, clearly meant a refusal to make any formal pronouncement on the broad question of the effects of adverse possession. Moreover, after having said that they did not think it necessary to make any formal pronouncement, it is not in the least likely that they would make any formal pronouncement covering a decision of any sort as to the effect of adverse possession. The conclusion at which they arrived was that "The result of the cases to which their Lordships have referred shows, in their opinion, that the Board has invariably applied the rule of the *Shivagunga* case as sound Hindu law where that rule was applicable." (p. 904).

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What, then, was the rule which they held to have been invariably applied? It was not the limited proposition that a decree based on title was binding on the reversioners. In the first place, in the case before them there was no question of a decree based on title. In the second place such a proposition would not be appropriately described as a rule, but as a particular decision based on some principle or rule. In the third place the cases discussed, of *Goluckmonee* (1), *Nobin Chunder* (2) and *Runchordas* (3), cases relating to mere adverse possession, are wholly irrelevant to any consideration of the effect of a particular decree.

The only other pronouncement in *Shivagunga's* case to which they could have been referring, and it may properly be called a rule, was that there are certain situations in which a widow represents the estate, so that acts by and against her bind the reversioners. In arriving at and giving the stamp of their approval to that rule, a reference to the cases of *Goluckmonee* and *Nobin Chunder* would be quite relevant, whatever might be the particular Limitation Act governing those cases, and equally so though they happened to be cases of mere adverse possession without any decree.

Counsel for the appellant had gone to the length of trying to discredit *Shivagunga's* case altogether. He was told, in effect, 'It may be open to argument that mere adverse possession against the widow does not, or that decrees based on adverse possession do not, bind the reversioner (as to that we make no formal pronouncement), but we would not listen to argument in support of either proposition based on the contention that in no case does the widow represent the estate, that the rule in *Shivagunga's* case that she does in appropriate circumstances is not binding in law.' It may be open to

(1) (1852) 2 Boulnois Rep., 193. (2) (1868) 9 W.R., 505.  
(3) (1899) I.L.R., 23 Bom., 725.

argument that the rule in *Shivagunga's* case was *obiter dictum*, but it has been followed. It is binding law. That is our opinion."

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I would answer the first question, then, by holding that the rule in *Shivagunga's* case, which their Lordships stamped with their approval as having been always applied where applicable, was merely the general rule that there are certain cases in which the Hindu widow represents the estate.

Boys, J.

As to the second question—did the approval of this rule challenge the correctness of the decision in *Runchordas' case*?—the answer is clearly in the negative. There is nothing in this confirmation of the rule in *Shivagunga's* case—that in certain cases the widow may represent the estate—that touches at all the question whether adverse possession is or is not a matter in which the widow may represent the estate.

The third question is, did their Lordships in the course of discussion throw any doubt on the correctness of the decision in *Runchordas' case*? Counsel for the appellants had urged that in *Runchordas' case* the Board could have, applying *Shivagunga's* case, held that the widow represented the estate in a matter of adverse possession and had not done so, and therefore, as was inconsequently argued, *Shivagunga's* case had been treated as no longer of authority. This argument might, according to the view hitherto taken in India of *Runchordas' case*, have been met by the simple reply that *Runchordas' case* did not discredit the rule in *Shivagunga's* case that in some cases a widow represented the estate, or the particular decision that in litigation in which the title was attacked the widow did represent the estate; that in *Runchordas' case* it was only held that in cases of mere adverse possession the widow did not represent the estate. But that was not the reply of the

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Board, and this appears of importance, for the reply actually made allows to *Runchordas'* case nothing approaching the wide effect allowed to it hitherto in India. Their reply was (p. 903):—"It does not appear to their Lordships how the rule in the *Shivagunga* case could have been applied in the case before the Board. . . . Their Lordships are unable to see *what was the estate, within the meaning of the Shivagunga case, which the widows had represented, or to what the rule in the Shivagunga case could have been applied.* The title of the trustees to the property devised or bequeathed to them for charity or religious purposes by Kallianji Sewji was not questioned until the survivor of the two widows died in 1888 and that property had never been represented by the widows or either of them. It had been in the exclusive possession of the trustees under the will of Kallianji Sewji from 1869 until the court in the suit which was brought on the 21st of December, 1888, after the death of the last surviving widow, had decided that the gift for charitable or religious purposes was void."

The Board then did not in any way suggest that *Runchordas'* case was wrongly decided. *They merely held that on its facts there was in that case no estate which the widows could be said to have represented to which the rule in Shivagunga's case could conceivably have any application at all.* I hold, therefore, that there was nothing in the discussion of *Runchordas'* case to suggest that that case was in any way on its particular facts wrongly decided.

*Fourth question* : Does the discussion of *Runchordas'* case in particular suggest that, granting that the correctness of the decision on its facts was not doubted, yet too wide a scope has been given to that case in decisions in India that purport to have followed it? The passage just quoted gives rise to this question. I have noted

at the commencement of this judgement, after setting out the five questions, that this question was never suggested, argued or discussed at the hearing.

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Though their Lordships did not hold that *Runchordas'* case was in any degree on its particular facts wrongly decided, there would in the language used appear to be a very definite limitation of the scope of the decision to its particular facts. In that case, in the view of the Board deciding *Vaithialinga's* case, no question of the widow representing the estate or even having ever represented the estate could be seriously said to have arisen, not because in cases of mere adverse possession the widow never represents the estate, but because of the very special circumstances of the case—she having never made any claim of any sort to the title, never having been in possession for a day, and having always assented to the title and possession of another; there was nothing in fact upon which the *Shivagunga* rule could operate whether affirmatively or negatively.

Boys, J.

In face of this how can *Runchordas'* case be held any longer to be authority for the broad proposition that a widow in cases of mere adverse possession (i.e. where there is no decree) can never be held to represent the estate so as to cause the reversioners to be bound by adverse possession against her?

Their Lordships' view, clearly and definitely expressed, of *Runchordas'* case as a decision based on its particular facts, and having no bearing on the main rule of *Shivagunga's* case that there might be cases in which the widow represented the estate, does not require any support from me. But there are one or two points in regard to which I think the bearing of their remarks and the reason for making those remarks were not correctly appreciated at the hearing.

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Boys, J.

It must be remembered that the only aspect in which the Board was considering *Runchordas'* case was to see whether anything was decided which discredited the main rule in *Shivagunga's* case which they were considering, and in order to answer that question they considered first whether any question of the widow representing the estate really arose in the case. Their comments might be expected, then, to be directed to this aspect only, and so they were. The Board refer to the fact that in the early stages of the suit the hardest fought question was that relating to the *dharm*. They say: "The main question in the suit was whether the gift for charitable or religious purposes was void for vagueness and uncertainty" (p. 901). It will be noticed from a consideration of the judgement of the Appellate Bench of the High Court how large the questions of *dharm* and trust loomed in the case.

A second comment made by the Board is that, at the stage when *Runchordas'* case had come before the Board, a main question for their consideration was that of the correct account. The foundation for this comment is apparent upon a consideration of the complicated details of the transit of various properties movable and immovable, which had belonged to the testator, and of the variety of transfers by which the property moved along the various channels, the decree as to the account being varied in each of the appellate courts.

These two comments were clearly made merely to show not inclusively all the points raised, but what were the points which called for most serious consideration and with which may be compared the total neglect of any question of the widow representing the estate.

The complete absence of all consideration of the latter question in the *Runchordas* judgement is explicable by there being, as the Board in *Vaithialinga's* case

state, no serious suggestion possible on the facts of the case that the widow had ever represented the estate. There is no other explanation. That there was absence of all consideration of the question of "whether the widow represented the estate" is apparent from the judgement.

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When we turn to the judgement, we find the question of limitation in reference to article 141 disposed of in a few lines, without even a mention of the question whether representation of the estate by the widows and the adverse possession against them might deprive the reversioners of the benefit of that article. It had been contended by Mr. Mayne for the appellants (see p. 731) that the widow represented the estate. No reference of any sort or description was made to this contention in the judgement of the Board. They merely held that there were a large number of articles in the Limitation Act and held briefly that article 141 is that which applies to the "*present suit*." They had had quoted before them by Mr. Mayne a number of authorities on the question of a widow representing the estate and the effect of adverse possession, including the case of *Lachhan Kunwar v. Manorath Ram* (1), but they made no reference to that or any other cases.

Boys, J.

The explanation of the Board's having in *Runchordas'* case treated with such scant ceremony Mr. Mayne's detailed argument that the widows represented the estate is to be found in the particular facts of the case rendering that argument in that particular case quite untenable. There is no other explanation of why the argument was treated as not worth discussion at a time when *Lachhan's* case stood and had been followed in the sense contended for by Mayne.

necessary to consider what might be the case if the

In *Runchordas'* case the Board said: "It is not

(1) (1894) I.L.R., 22 Cal., 445.



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widows or the survivor of them were suing, as the plaintiff does not derive his right from or through them and the extinguishment of their right would not extinguish his."

Boys, J.

It has been suggested in some way that in making this observation their Lordships were expressing an opinion that the widow did not represent the estate. But a little consideration will show that that is not so. The observation was made in connection with the contention of counsel that the reversioners had lost their rights by virtue of section 28. Their Lordships brushed this contention aside by pointing out that while section 28 could have no bearing on the title of the reversioners *directly*, because the period limited for them is not determined, section 28 could also have no bearing on their loss of title *by limitation* (to which form of loss alone section 28 relates) as representatives of the widow, because they did not claim through the widows.

This is entirely in accord, if I may say so, with the view that I have already expressed that there is no suggestion of the reversioner losing by limitation, either directly by some other provision of the Limitation Act or indirectly because he claims through some other person who is barred, a right given to him by the Limitation Act. He loses his right (or rather he fails to get the right given by article 141) if, and it is the point we are considering, he loses it at all, not by virtue of claiming through the widow, but because the widow was representing the estate when she lost her right. This passage from their Lordships' judgement in *Runchordas'* case had, then, no bearing on the question whether the widow was representing the estate, and this in my view explains fully their Lordships' remark in *Vaithialinga's* case that the Limitation Act was not applied as counsel asked for it to be applied, and the passage from *Runchordas'* case is quoted to show why it was not applied.

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Another instance of failure to appreciate the trend of the Board's comments in *Vaithialinga's* case relates to the following passage. The Board in speaking of the judgement in *Runchordas'* case said: "The defence of limitation was raised, but the Board held that it did not apply." It was suggested at the hearing that the Board in *Vaithialinga's* case seemed to be suggesting by this comment that no question of limitation had been dealt with or it had been held to be irrelevant. In the first place it is manifestly impossible on the face of it that the Board could have meant anything so plainly contrary to the facts. They did not of course mean that no question of article 141 had been raised and that that article had not been applied. The words must be read with the quotation from *Runchordas'* case which follows and which I have just noticed. Clearly all that was meant was that the defence of limitation was raised that the widows were barred by section 28 and article 144, and the reversioners therefore also through them, and that the Board had held that the defence that the reversioners were in that way barred by limitation did not apply because the reversioners did not derive their right from the widows. The passage was quoted merely to show why the defence of limitation based on section 28 and article 144 was not applied.

If, therefore, it is not presumptuous for me to say so, the history of the passage of *Runchordas'* case through the various courts supports the declaration of the Board in *Vaithialinga's* case that *Runchordas'* case was decided upon its particular facts, and that no serious question of there being on those facts any representation of the "estate" by the widows was possible.

*Fifth question* :- In view of the opinion of a majority of this Bench expressed at the hearing against the contentions of appellant's counsel on the first three questions (the fourth not having arisen), counsel naturally did

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not pursue argument for a reconsideration of whether a Hindu widow might not in the matter of adverse possession, in some circumstances at any rate, represent the estate.

*Boys, J.* While, holding the view that I have expressed that the scope of *Runchordas'* case has been shown by the observations of their Lordships to be properly much narrower than has been assumed, I should have been glad to hear the further question argued as to whether the widow could in any way, and, if so, to what extent and when, represent the estate, with particular regard to the matter of adverse possession, it would be equally infructuous for me to proceed to examine it fully and I will only state some propositions on which I should like to have heard arguments.

The decisions as to the effect of decrees based on title and on adverse possession being only particular instances of the application of the rule in *Shivagunga's* case, it would have been of interest to consider why, if some decrees properly obtained bind the reversioners on the principle that the widow represents the estate, the widow should not, *at any rate in some cases*, be held to represent the estate where there is merely a question of adverse possession against her. If it be suggested that in the case of mere adverse possession the reversioners cannot interfere, it is equally the case that in a suit by or against the widow they cannot interfere and yet they may be bound. It is suggested that it would be most inequitable to hold the reversioners to be bound by the mere inaction of the widow in allowing somebody else to acquire title by adverse possession. She may have been negligently inactive. But such an argument only begs the question, *by assuming a fact*,—negligent inactivity on the part of the widow. It might well be that the widow had not been merely inactive, but

had consulted with her legal advisers, and possibly even with the reversioner himself, and had properly and wisely arrived at the conclusion that it was better not to fight the alleged trespasser in regard to a small portion of the estate and by that fight perhaps risk the raising of a possible doubt as to the title to the whole estate,—a matter hitherto passing unnoticed; or that at least it was desirable to avoid risking the wasting of the rest of the estate in useless litigation. How, it might be asked, can it be said that she was not in every sense of the term representing the estate, just as much as she would have been if she had actually embarked on useless litigation? Clearly each of these instances of negligent inactivity and the case I have suggested differs in its facts and, in justice, calls for a different answer.

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Again, does not a hard and fast rule lead to the following extraordinary position? Where (a case mentioned at the hearing) adverse possession has begun against the last male holder and one day later he dies and the adverse possession continues against even a negligently inactive widow for eleven years and three hundred and sixty-four days, the reversioner is held bound; but if the last male owner had died the day before adverse possession began, then, though an active widow after taking advice, possibly of the then next reversioner, had decided not to waste the rest of the estate in useless litigation, the reversioner would not be bound. Again, where a widow has *bonâ fide* fought an alleged trespasser in the courts and lost, the reversioner is held bound, but where the alleged trespasser can only say "I had such a strong case that no one thought it worth while to fight me," twenty years later his son may be called on to fight a law suit when evidence has been lost.

What is the apology for these and other such anomalies? Is there any principle underlying them?

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To refer to a few cases,—in *Saroda Soondury v. Doyamoyce* (1), and cases in which it was followed, the reversioners were held bound. By *Srimath Kur v. Prosunno Kumar* (2), and the cases which followed it, they were liberated. By *Lachhan Kunwar v. Manorath Ram* (3), and the cases in which it was followed, they were bound again. (The Judicial Commissioner in plain language so held and their Lordships concluded by affirming in plain language the correctness of his finding and in this sense the case was for some time understood.) And it is suggested that by *Runchordas'* case they have been liberated again.

The nearest approach to a suggestion of any governing principle is based on a change as between the Limitation Acts of 1859 and 187. But is there any *real* value in this suggestion? It could in any case only account for one change. But in fact as early as 1883, when the Limitation Acts of 1871 and 1877 were comparatively recent, PRINSEP, J., in *Srinath Kur v. Prosunno Kumar* (2), said he had great hesitation in coming to the conclusion that the Legislature in 1871 deliberately altered the law laid down in 1868, and only agreed with reluctance. Again, article 141 of the Act of 1877 did not prevent their Lordships of the Privy Council from holding in *Hari Nath v. Mothurmohun* (4), that the reversioner was not a person "entitled," having lost his title by the decree against the widow. If he can lose his title in one way by a decree, there is no reason why he should not be held to have lost it in another way if the particular circumstances are such that the widow can be held to have represented the estate within the meaning of the main initial rule of *Shivagunga's* case; and that such circumstances may very well exist I have already shown.

I note here that a reference was made to article 141 at the hearing before us. Counsel for the appellants

(1) (1880) I.L.R., 5 Cal., 938.

(2) (1883) I.L.R., 9 Cal., 934.

(3) (1894) I.L.R., 22 Cal., 445.

(4) (1893) I.L.R., 21 Cal., 8.

urged that the reversioners were not persons "entitled" within the meaning of article 141 and therefore could not claim the benefit of that article. When asked how they could be said to have lost their title, he referred to section 28 and article 144. But the obvious answer to him was that the title referred to in article 141 of the Limitation Act could not be possibly held to have been lost by the provisions of some other general article of the same Act such as article 144, for such a view would be to nullify the former article (though it might be different in the case of such an article as article 129). The reversioners clearly could not be held to have lost their title by virtue of the provisions of article 144. The real answer is that which I have stated.

There is no question of destroying a right given to the reversioner by one article of the Limitation Act by calling in aid another article of the same Act. The reversioner's right would not be taken away by any provision of the Limitation Act. The initial point for determination is whether *the widow herself* is barred by adverse possession. That is determined by the Limitation Act, by article 144. If that is determined against her, there is no further calling in aid of the Limitation Act. The next point for determination is whether, considering all her acts and omissions, she was really representing the estate. If she was, the case comes within the rule of *Shivagunga's* case and the reversioners are barred by that rule, not by any section of the Limitation Act, the right to the estate has been lost by virtue of that rule, they are not "entitled" and they do not come within article 141 at all.

Again, unless this is the meaning of the word "entitled,"—the meaning, moreover, given to it by the Board in *Hari Nath v. Mothurmohun* (1),—I am unable to give any meaning to it at all. Ordinarily speaking, no

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(1) (1893) I.L.R., 21 Cal., 8.

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person can sue at all with success unless he has a title to sue, and there will be no meaning in inserting the word in article 141. But there was a definite reason in this particular case if it was desired to emphasize that there were cases in which, though he would ordinarily be entitled, the reversioner might have lost his title through somebody else (not the person through whom he claimed) having lost their title—his title being thus prevented from maturing by reason of the application of the principle laid down in *Shivagunga's* case. It was considered desirable by the insertion of the word "entitled" to exclude the reversioner from getting the benefit of article 141 in those cases where owing to this special rule his title had not matured, and to suggest that the effect of the insertion of the word "entitled" is confined to cases where a decree has been obtained against the widow is to beg the whole question.

Nor does this view render article 141 meaningless. There remain all those cases upon which article 141 can operate in which the reversioner is still "entitled," for instance, a case where, though adverse possession is proved against the widow, it is not proved that she was representing the estate in her acts and omissions. In such a case, but for article 141 the reversioners would come under article 144.

It has been suggested, though again of course the point has not been argued, that the reversioners could have no right to bring a declaratory suit. Whether this is so or not, and it is by no means certain, I am unable to appreciate why it should be necessary for them to bring a declaratory suit. When the widow dies, if the reversioner is resisted in obtaining possession he would bring a suit in the ordinary way, and the question would have to be decided whether he is "entitled" or not. The need for debating whether he could bring a

declaratory suit would only arise if it was suggested that the reversioner was bound in *all* cases of adverse possession against the widow, and of course nobody suggests anything of the sort.

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Failing any question of principle, the only other answer given, so far as I am aware, is that there is much that is not logical in Hindu law as determined by the courts and that it has been held in *Runchordas'* case that a Hindu widow in the matter of adverse possession never represents the estate unless a decree has been obtained. But if the right view of that case, since their Lordships' discussion of it, be that which I have suggested, *Runchordas'* case is not authority for any such wide proposition, but, while itself consistent with logic and common sense, leaves the door wide open to the application of common sense and logic to other sets of circumstances.

Do not these considerations suggest that there can be no hard and fast rule and that the appropriate answer is that in each case the question whether the widow represents the estate must be answered, as in the case of decrees, on its own facts and that in certain circumstances, though not in every case any more than in the case of every decree, the widow may represent the estate and the reversioner be bound?

However all this may be and whatever view might eventually be taken of these and other considerations, it would be infructuous to pursue this question in view of the fact that, upon a majority of this Bench expressing their opinion that their Lordships' observations in *Vaithialinga Mudaliar v. Srirangath Anni* (1) did not throw any doubt on the correctness of the decision in *Runchordas'* case as hitherto understood, this, actually the referred question, was not argued.

(1) (1925) I. L. R., 48 Mad., 883.



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I would answer this reference as follows:—

(1) The rule in *Shivagunga's* case which was affirmed by their Lordships at p. 904 of *Vaithialinga Mudaliar v. Srirangath Anni* (1), was the initial main rule, and that only that there are cases in which the widow represents the estate so that acts and omissions by her may bind the reversioners. They did not make any pronouncement at all, either formal or by way of *obiter dictum*, on the effects of adverse possession against the widow or in what, if any, circumstances she represented the estate in reference to adverse possession against her.

(2) The confirmation by their Lordships of this rule in *Shivagunga's* case did not in any way challenge the correctness of the decision in *Runchordas v. Parvatibai* (2).

(3) Nothing that was said in this discussion of *Runchordas'* case in particular suggests that in their Lordships' view that case was wrongly decided.

(4) The discussion of *Runchordas'* case, though it does not suggest that the case on its particular facts was wrongly decided, does narrow the scope of that case, showing that it is not, as it has been treated as being, authority for any broad proposition that a Hindu widow does not, in the matter of adverse possession, where there is no decree, ever so represent the estate that the reversioners will be bound by adverse possession running for 12 years against her.

(5) This question, which is the one actually referred to the Full Bench, was not argued and I, therefore, express no opinion in regard to it beyond stating that, as at present advised, I am of opinion that the question whether a reversioner is barred by adverse possession against the widow on the basis that she represented the

(1) (1925) I. L. R., 48 Mad., 883.

(2) (1899) I.L.R., 23 Bom., 725.

estate, thus coming within the main rule of *Shivagunga's* case, is a question to be decided, as in the case of decrees, on the facts of the particular case.

ORDER OF THE COURT :—With these answers let the Reference be returned.

*Before Mr. Justice Sulaiman, Acting Chief Justice  
Mr. Justice Mukerji and Mr. Justice Boys.*

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*Civil Procedure Code, order XXI, rule 2(1)—Execution of  
decree—Decree-holder certifying payment out of court  
—Limitation—Statement of payment in application for  
execution—Decree payable by instalments—Provision  
that on default of any two successive instalments the  
whole of the balance shall be paid—Act No. IX of 1908  
(Indian Limitation Act), articles 181 and 182(7).*

There is no period of limitation applicable to a decree-holder certifying a payment under order XXI, rule 2(1), of the Civil Procedure Code.

It is not necessary that a decree-holder must certify the payment some time before the decree would, if such payments were ignored, be time-barred.

A statement of payment made by the decree-holder in the application for execution satisfies the requirements of order XXI, rule 2(1) and permits him to prove that the payment was in fact made.

If, after an application for execution has been made, the decree-holder makes a statement purporting to certify an alleged payment, then if such statement is made before any controversy arises, either by a court officer reporting the application to be barred by limitation or by objection by the judgement-debtor or otherwise, such statement has the effect of a certificate. But if such statement is made after controversy arose, while there is no reason why the court should

\* First Appeal No. 488 of 1926, from a decree of Mirza Nadir Husain, Subordinate Judge of Dehra Dun, dated the 25th of June, 1926.

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refuse to allow the statement to be filed for any other purpose than that of constituting a certificate, e.g., to place on record evidence suggesting that the omission in the application for execution was a *bond fide* mistake, it cannot have the force of a certificate.

Where a decree directs payment by instalments on named dates, and further directs the judgement-debtor to pay the entire balance due if he makes default as to any two successive instalments, then—

(1) If the application for execution is one for the payment of instalments under the first part of the decree, it will be governed by article 182(7) of the Limitation Act, and the date from which limitation will run as regards each instalment will be the date on which that instalment was due.

(2) [*Per* SULAIMAN, A.C.J., and BOYS, J. (MUKERJI, J., dissenting)]. If the application for execution is one for the remaining unpaid balance of the decretal amount under the second part of the decree, it is not governed by article 182 at all but by article 181 and limitation will run from the date of the last of any two successive defaults, the decree-holder being entitled to recover the whole balance due less the amount of any individual instalments which, regarded as individual instalments, are already barred by limitation.

In cases of this description it is undesirable to interpret the application too strictly; the court may well pay regard to the substance of the application.

*Peare Mohan v. Raghunath* (1), *Shankar Prasad v. Jalpa Prasad* (2), *Lachmi Narain v. Sarju Prasad* (3), *Maung Sir v. Ma Tok* (4), and *Muhammad Islam v. Muhammad Ahsar* (5), referred to. *Bahy Muhammad Saha v. Aijanmai* (6), dissented from. *Baij Nath v. Panna Lal* (7), *Gokul Chand v. Bhika* (8) and *Bhajan Lal v. Cheda Lal* (9), overruled. *Chattar Singh v. Amir Singh* (10), not approved.

The facts of this case were briefly as follows:—A decree based on a compromise was passed on the 16th of

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| (1) (1927) I. L. R., 50 All., 259. | (2) (1894) I. L. R., 16 All., 371.  |
| (3) (1916) I. L. R., 39 All., 230. | (4) (1927) L.R., 54 I.A., 272.      |
| (5) (1894) I. L. R., 16 All., 237. | (6) (1921) 26 C. W. N., 529.        |
| (7) (1924) I. L. R., 46 All., 635. | (8) (1914) 12 A. L. J., 387.        |
| (9) (1914) 12 A. L. J., 825.       | (10) (1916) I. L. R., 38 All., 204. |

June, 1918, by which Rs. 6,000 was to be paid by the defendants on the 12th of July, 1918, and the balance of Rs. 7,512 was to be paid by annual instalments of Rs. 1,000, on the 16th of June of each year. The decree further provided that in case of default of any two consecutive instalments the defendants would pay up the whole of the balance remaining due. The Rs. 6,000 was duly paid, and the first instalment of Rs. 1,000 was paid on the 1st of July, 1919, and was accepted by the decree-holders. On the 14th of September, 1925, the decree-holders filed an application for execution, in which they gave credit for two sums of Rs. 2,000 each, stated in the application to have been paid to them on the 12th of June, 1921, and the 14th of June, 1923, respectively. They claimed to recover the balance, Rs. 2,512, with interest. On the 29th of October, 1925, the judgement-debtors filed objections, denying that they had made any payments in 1921 and 1923, and pleading that under the default clause in the decree the whole amount remaining due became payable in June, 1921, and that, therefore, the application for execution was barred by time. It was further pleaded that inasmuch as the alleged payments had not been duly certified they could not be recognized by the court. Thereafter, on the 24th of April, 1926, the decree-holders filed an application certifying the said payments. The court dismissed this application, as well as the application for execution on the ground of being barred by time. The decree-holders appealed to the High Court. The appeal came up before a Division Bench, which referred the following five questions for decision by a Full Bench :—

- (1) Whether there is any period of limitation applicable to a decree-holder certifying a payment under order XXI, rule 2, sub-rule (1) of the Civil Procedure Code?

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- (2) If not, must a decree-holder certify payment before a decree will be time-barred if the payment sought to be certified by the decree-holder be ignored?
- (3) Whether a statement of payment made by the decree-holder in the execution application satisfies the requirements of order XXI, rule 2, sub-rule (1) of the Civil Procedure Code and permits him to prove that the payment was, in fact, made?
- (4) Whether a decree-holder may certify an alleged payment after he has made an application for execution, so as to be able to prove that payment in the execution proceedings?
- (5) Where a compromise decree directs payment of the decretal amount by instalments on particular dates and also authorizes the decree-holder, in the case of a default in payment of one or more instalments, to realize the balance of the decretal amount at once, what are the "such dates" within the meaning of clause (7) of article 182 of the first schedule of the Limitation Act, namely, the dates fixed for the payment of the instalments, or the date of the default?

The matter was laid before a Bench consisting of SULAIMAN, A.C.J., MUKERJI, J., and BOYS, J.

Mr. *Nehal Chand* and Dr. *Kailas Nath Katju*, for the appellants.

Babu *Piari Lal Banerji*, for the respondents.

SULAIMAN, A.C.J. :—The facts of this case are briefly as follows :—A suit was compromised between the parties on the 16th of June, 1918. The substance of the compromise was embodied in the decree. Reading the decree in the light of the compromise, there can

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be no doubt that it provided that Rs. 6,000 would be paid by the defendants to the plaintiffs on the 12th of July, 1918, and the remaining amount would be paid by annual instalments of Rs. 1,000 each on the 16th of June in the following years in succession. The decree further provided that in case of default of two (consecutive) instalments, the defendants will pay the whole of the balance remaining unpaid to the plaintiffs. Admittedly Rs. 6,000 was duly paid. Rs. 1,000 was paid on the 1st of July, 1919, and the decree-holders accepted it.

On the 14th of September, 1925, the decree-holders filed an application for execution, out of which this appeal arises, giving credit for two sums of Rs. 2,000 each, stated in the application to have been paid on the 12th of June, 1921, and the 14th of June, 1923. They claimed that under the compromise decree they were entitled to recover the instalments of 1924 and 1925, together with interest. It is clear that their application was filed after all the instalments had fallen due even without enforcing the default clause.

On the 29th of October, 1925, the defendants filed an objection denying that they had made any payments in 1921 and 1923 and pleading that under the default clause the whole amount became due in June, 1921, and that the present application, being made more than three years after that date, was barred by time. It was further pleaded that inasmuch as the alleged payments had not been duly certified, they could not be taken cognizance of by the court. After this, namely, on the 24th of April, 1926, the decree-holders filed an application certifying the payments alleged to have been made. The learned Subordinate Judge dismissed this last application, from which the decree-holders have attempted to file an execution appeal which is connected. He

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also dismissed the application for execution, holding that it was barred by time. The main appeal has been preferred from that order.

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The Bench before whom the case came up in the first instance has referred five questions to this Full Bench. The first four turn on the provisions of order XXI of the Code of Civil Procedure and the last one on article 182 of the Limitation Act.

There can be no doubt that the view taken by this Court in a series of cases, as regards the provisions of order XXI, rule 2, has not been accepted by a great majority of the Judges of the other High Courts, although even in these other High Courts there has not been always a complete uniformity.

I think that if we were satisfied that the practice which has prevailed in this Court for the last 14 years or so is contrary to the express provisions of the law, we should have no hesitation in overruling the cases of this Court which lay down that rule of practice.

The principle of *stare decisis* does not apply to such decisions as cannot be considered to have affected any rights in property or title or to have affected contracts and other dealings. Another reason for not hesitating to reconsider those rulings is the circumstance that at least one learned Judge has recently expressed doubt on the soundness of those rulings. And lastly the present Full Bench has been constituted by his Lordship the CHIEF JUSTICE with the express purpose of reconsidering those cases, presumably in view of the fact that a different view prevails in the other High Courts.

The first question is:—"Whether there is any period of limitation applicable to a decree-holder certifying a payment under order XXI, rule 2, sub-rule (1), of the Civil Procedure Code."

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It is obvious that there is no express article of the Limitation Act which is made applicable to the certification of payment by the decree-holder; similar to article 174 which applies to an application by the judgment-debtor under order XXI, rule 2, sub-rule (2). We have therefore only to consider whether article 181, the omnibus article for applications, is applicable. The Calcutta High Court in the case of *Bahy Md. Saha v. Aijanmai* (1) has considered it to be applicable. With great respect I cannot agree. Order XXI, rule 2, sub-rule (1), speaks of "certifying payment." It does not say "apply to certify" or "apply that the certificate may be recorded." All that the decree-holder is to do is to declare that he has received payment. He need make no application to the court, and may not ask the court to do anything at all. Such certificate may not contain any prayer to the court. After such payment is certified it is the duty of the court to record it. Sub-rule (3) speaks of "certified or recorded." Thus a certificate by itself is sufficient. It therefore seems to me that the certification by the decree-holder is not by way of application. If no application is necessary article 181 cannot apply.

Another reason for holding that article 181 is inapplicable is that it allows three years from the date when the right to apply accrues. Certification is not a right of the decree-holder. It is a duty cast upon him. I have therefore no hesitation in answering the first question in the negative.

The second question is :—"If not, must a decree-holder certify payment before a decree will be time-barred, if the payment sought to be certified by the decree-holder be ignored?"

The logical result of holding that there is no bar of limitation under the Limitation Act is that no restriction as to any time-limit can be imposed on the certification. To say that a decree-holder must certify payment

(1) (1921) 26 C. W. N., 529.



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before his decree becomes *primâ facie* time-barred is undoubtedly to impose a time-limit. In my opinion there is no justification for such a view. Further, the requirement of the certification being made before the decree becomes *primâ facie* time-barred may sometimes make the certification impracticable or even impossible. Payment may be made to the decree-holder at a distant place just a short time before the three years are about to expire, and it may be impossible or impracticable for the decree-holder to rush to the court in time and certify the payment.

In the case of *Baij Nath v. Panna Lal* (1) the learned Judges appear to have thought that the legislature contemplated that the certification should be made within a reasonable time, and that that reasonable time is at least before the expiry of the period of three years. A prompt certification is no doubt desirable. That is a matter for the Rules Committee to consider. On the language of the rule as it stands there is nothing which debars a decree-holder from certifying payment after the ordinary three years for an application for execution have expired. My answer is that a decree-holder is not bound to certify payment before his decree is *primâ facie* time-barred.

The third question is :—“Whether a statement of payment made by the decree-holder in the execution application satisfies the requirements of order XXI, rule 2, sub-rule (1) of the Civil Procedure Code and permits him to prove that the payment was in fact made.”

The argument of the learned counsel for the objectors is that certification is a distinct and separate proceeding from the filing of an application for execution, and accordingly a certificate cannot be contained in the application itself. He relies strongly on the cases of

(1) (1924) I. L. R., 46 All., 635.

*Gokul Chand v. Bhika* (1), *Bhajan Lal v. Cheda Lal* (2), *Chaitar Singh v. Amir Singh* (3), and *Baij Nath v. Panna Lal* (4). No doubt his contention is fully borne out by the opinions expressed in these cases. He further argues that order XXI, rule 11, sub-rule (e), which requires a decree-holder to supply particulars "whether any, and (if any) what payment or other adjustment of the matter in controversy has been made between the parties subsequently to the decree," is quite a different thing from the certification required by rule 2, sub-rule (1). In my opinion the two rules are intended for quite distinct purposes. Rule 11 lays down particulars which have to be mentioned in the application for execution. Rule 2 lays down the necessity for certification and the consequences of its omission. The mere fact that certification is mentioned in one rule and particulars of payment and adjustment in another rule cannot justify the inference that the two cannot be contemporaneous or simultaneous. I think that the particulars given in an application for execution, if they amount to a certification by the decree-holder that payment or adjustment has been made, are perfectly good and comply with the requirements of rule 2, sub-rule (3). In the absence of any provision laying down the law to the contrary, I must hold that the certificate may be contained in the application for execution itself. Admittedly the certificate may be given just previous to the filing of the application on the same day and almost at the same time. If that is permissible, there is no good ground for holding that the two cannot be contained in one and the same document but must be evidenced by two deeds filed one after the other.

In the case of *Peare Mohan v. Raghunath* (5). MUKERJI, J., expressed a doubt as to the view which

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(1) (1914) 12 A. L. J., 387.

(2) (1914) 12 A. L. J., 825.

(3) (1916) I. L. R., 38 All., 204.

(4) (1924) I.L.R., 46 All., 635.

(5) (1927) I.L.R., 50 All., 259.

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had prevailed in this Court, but felt bound to follow it. ASHWORTH, J., agreed with the previous view, but for a different reason. His ground was that section 20 gives a fresh period of limitation from the time of payment, and order XXI, rule 2, enacts that an uncertified payment shall not be recognized. Reading these two provisions together he thought that "an execution court must compute limitation from the date, not of payment, but of certification." But when the Limitation Act does not make certification a fresh starting point, limitation cannot be computed from it. As certification will ordinarily be some time after payment, to calculate limitation from the date of certification would amount to extending time.

I am of opinion that the view, which prevailed previously in this Court, that certification must of necessity be a separate and independent proceeding, is not correct. My answer to the third question is in the affirmative.

The fourth question is :—"Whether a decree-holder may certify an alleged payment after he has made an application for execution, so as to be able to prove that payment in the execution proceedings."

In the view which I have expressed on the third question it will ordinarily not be necessary for the decree-holder to rely upon a subsequent certificate. But cases may arise where the fact of payment was, owing to a mistake, or oversight, or some other cause, not mentioned in the application. In such cases the decree being *prima facie* barred by time, the court will probably not direct notice to issue. There seems to be nothing in law to prevent the decree-holder from certifying payment after having filed his application for execution, with a view to request the court to recognize such payment and then order notice to issue. Nor is there any

provision which prevents him from amending his application, provided no question of limitation is involved. But once an objection has been taken either by an officer of the court before the issue of notice, or by the judgment-debtor when he appears to contest the application, the time has come for the court to refuse to recognize the uncertified payment, and the decree-holder cannot, by certifying subsequently, cure the defect. This is my answer to the fourth question.

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The fifth and last question referred is :—“Where a compromise decree directs payment of the decretal amount by instalments on particular dates and also authorizes the decree-holder, in the case of a default in payment of one or more instalments, to realize the balance of the decretal amount at once, what are the “such dates” within the meaning of clause 7 of article 182 of the first schedule of the Limitation Act, namely, the dates fixed for the payment of the instalments or the date of the default?”

The form in which the default proviso is mentioned in this question is due to a slightly inaccurate translation of the compromise decree which had been placed before the learned Judges. It does not say that in the case of default the decree-holder shall have power or option to recover the amount, but says that the amount shall be paid by the defendants to the plaintiffs. But in the view which I take of the question, such a variation would not, in my opinion, be material.

The case has been argued with great ability on both sides and numerous rulings have been cited. There is undoubtedly a sharp conflict of opinion on the question whether in the case of such instalment decrees the first default makes time begin to run in respect of all subsequent instalments so as to compel the decree-holder to apply for execution within three years of the first default,

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on penalty of losing his right, or whether he has a recurring right on each of the successive defaults. In my opinion much confusion has been caused because of relying on considerations which are outside article 182, clause (7). In some cases Judges have differed as to whether waiver by the decree-holder would save time or not. Opinions have been expressed both for and against the view that the principle of successive defaults embodied in article 75 should be applied in this case also. Sometimes the decision has depended on whether it was compulsory for the decree-holder to apply for execution on the happening of the first default, or whether he had the option to ignore it and wait for the next default. Then Judges have differed as to how far mere abstinence on the part of the decree-holder from taking out execution for the whole amount due on a default is waiver. An elaborate discussion of this point is to be found in the case of *Shankar Prasad v. Jalpa Prasad* (1). Throughout the judgement there is no mention of the article which was applicable, but possibly the learned Judges were assuming that article 179 of the old Act, corresponding to article 182 of the present Act, was applicable, but they have omitted to say so. The extent to which considerations of the compulsory or optional character of the default clause can lead one is illustrated by two cases which were differently decided by Benches in both of which RICHARDS, C.J., was a member. In the case of *Chattar Singh v. Amir Singh* (2) the proviso was:—"If default was made in the payment of instalments, the full amount should become due." It was held that the decree directed that the full amount should be paid on default. In the case of *Lachmi Narain v. Sarju Prasad* (3) the clause was to the effect that upon failure to pay any one instalment, the decree-holder

(1) (1894) I. L. R., 16 All., 371. (2) (1916) I. L. R., 38 All., 204.

(3) (1916) I. L. R., 39 All., 230.

would have the power to realize the whole decretal amount without waiting for any future instalments. It was held that the decree-holder not being bound to execute his decree for the whole amount, the decree could not be said to have directed the payment on default.

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In my opinion, before considering the question whether a particular suit or application is barred by time, it is essential to settle at the very outset which particular article of the Limitation Act applies to the case, and then to examine the language of that article only. It is dangerous to assume that there is any general principle underlying the whole of the Limitation Act governing cases of default. Each article has its own phraseology for fixing the time from which limitation begins to run, and we have only to determine the date which, on the language of the relevant article, is fixed. For instance, article 75 talks of default being made and of the waiver of the default by the payee. Article 132 uses the expression "when the money becomes due." Article 181 says "when the right to apply accrues." Article 182, sub-clause (7), has the expression "the certain date on which the decree directs payment." Now all these expressions are different and do not necessarily mean the same thing.

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The very first thing to decide is which article applies. Now article 181 is the general article for applications, but it only applies to applications for which no period of limitation is provided elsewhere. If an application is specifically provided for, article 181 is out of the question.

In this connection I might refer to the case decided by their Lordships of the Privy Council, *Maung Sin v. Ma Tok* (1), to which the present case has some resemblance. There, too, the decree provided that the husband

(1) (1927) 54 I.A., 272.

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would pay Rs. 2,000 annually to the wife and remain in possession of the disputed property, but in case of default of payment the property would be made over to the wife. So far as the application to recover the instalments due was concerned, the case was clearly governed by article 182, sub-clause (7), and their Lordships held that that article applied. Then, dealing with the wife's right to recover the property on account of the default, their Lordships held that upon the construction of the decree itself, on the occasion of a default in each payment the right of the respondent to have the said property made over to her arose, and therefore the claim was not time-barred because it was made more than three years after the first default. Their Lordships have not mentioned the particular article which applied to that application. Article 182, clause (1), could not possibly have applied, as the default might occur long after the expiry of three years from the decree. Unless their Lordships considered that the expression "enforce any payment" was wide enough to cover the claim to recover possession of the property, article 182, clause (7), could not have applied. I venture to think that as article 182 was not in express terms applicable, their Lordships had in mind the provisions of article 181, under which, having regard to the construction of the decree, the right to apply accrued each time that a default was made. I might mention that in a similar case where the default entitled the decree-holder to recover possession of immoveable property, this Court, in the case of *Muhammad Islam v. Muhammad Ahsan* (1), held that the general article, article 178 of the old Act, applied and not the article for execution applications. If therefore the present case is governed by article 182, the principle underlying the decision of their Lordships of the Privy Council would not govern it.

(1) (1894) I. L. R., 16 All. 237.

I fail to see how the decree-holder's application for recovery of the instalments after the dates for their payment have expired can be taken out of article 182. It is an application for execution of a decree not provided for by article 183, or section 48 of the Code of Civil Procedure, and therefore comes expressly within the language employed in column 1 of article 182. The application is to recover the instalments which fell due in June, 1924 and 1925, and was made after these dates had passed, and within three years of those dates. The decree had expressly directed the payment of these instalments on specified dates, 16th of June, 1924 and 16th of June, 1925. *Primâ facie*, therefore, the application is governed by article 182, clause (7), and the decree-holder has three years from each of the two dates fixed.

The learned advocate for the judgement-debtor relies on the proviso which stated "that if default in the payment of two instalments is made, the whole amount shall be paid by the defendants" and contends that the whole amount became payable on the 17th of June, 1921, by which time two consecutive defaults had taken place. For the purpose of deciding this point it is of course assumed that the decree-holder is precluded from proving that any payments were made in 1921 or 1923. The argument is that the date of this future default was the date fixed by the decree for the payment of the whole decretal amount. The answer to the question before us will depend on the meaning of the expression "certain date" in the clause. I think that in the previous cases of the High Court referred to by me attention was not directed to the significance of this expression. The corresponding clause in the Act of 1871 contained the expression "specified date". That necessarily connoted the idea that the exact date should be mentioned in the decree. The substitution of the word "certain" in place of "specified" widens the scope of its meaning. It

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is no longer necessary to mention by the year, month and day the exact date in the decree. All the same the date fixed for payment must be a certain date. In my opinion the word "certain" is used in contradistinction to "uncertain". It is not used in the sense in which one might say that a certain man came to see me. It obviously means a date which, though not expressly mentioned or ascertained, must yet be a date which must certainly occur. The word "certain" in my opinion is a contrast of the word "uncertain" as that word is used for instance in sections 32 and 33 of the Contract Act, or sections 21 and 23 of the Transfer of Property Act.

In the present case, at the time when the decree was passed it could not be known definitely and it was not at all certain whether two consecutive defaults would be made by 1921. If the judgement-debtors went on paying the instalments regularly, there would never be any default. It is therefore impossible in my opinion to say that the decree had fixed a "certain" date for the payment of the whole amount in a lump sum. Such a date was not at all certain. It was dependent on the contingency of two consecutive defaults happening. The date might or might not come at all. No doubt it is now known that the defaults were made and a date arrived when the default clause could be enforced, but this was not certain when the decree was passed.

I am, therefore, clearly of opinion that in such instalment decrees where the whole amount becomes due only if default is made and not due if no default is made, the date of default, which does later on occur by chance, is not a date certain on which payment is directed by the decree. In this view time did not begin to run under article 182 for the recovery of all the subsequent instalments from the date of the first default, but under clause (7) a separate period of three years is prescribed

to run from the respective dates on which each instalment fell due.

In such circumstances the application for the recovery of the amounts of instalments which fell due more than three years prior to the application would, unless it was saved by sections 19 or 20, be barred by time; but the application would still be within time as regards those instalments which fell due within three years, in spite of a default clause.

As the dates fixed for all the instalments had expired before the application for execution was made, there was no necessity for the decree-holder to enforce the default clause; his application is substantially one for recovery of the total amount of the instalments fallen due, together with interest.

The case where a decree-holder applies to recover the whole amount by enforcement of the default clause before the dates fixed for the subsequent instalments have arrived would be quite different. Such an application would not fall under article 182 (7), nor, as is obvious, under clause (1), and would therefore be governed by the general article 181. This is my answer to the last question.

MUKERJI, J. :—This is a reference to a Full Bench for its opinion on five points which have been formulated as below.

[These are set forth at pp. 239-240.]

The questions have arisen under circumstances which have been detailed in the judgement of the learned ACTING CHIEF JUSTICE and I need not mention them again. My view on the first four questions are contained in my judgement in the case of *Peare Mohan v. Raghunath Lal* (1). I would therefore indicate them again very shortly.

(1) (1927)-I. L. R., 50 All., 259.

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On the first question,—whether there is any period of limitation applicable to the decree-holder certifying a payment under order XXI, rule 2, sub-rule (1) of the Civil Procedure Code—there can be but one answer, namely, that in the negative. The simple reason is that the law of limitation (Act No. IX of 1908) does not at all provide for any such period. A certificate of payment given by the decree-holder to the court is a mere intimation to it that he has received a certain sum of money from the judgement-debtor or that the decree has been wholly or partially satisfied in a particular way. That being the nature of a certificate, it is not an “application”, and article 181 of the Limitation Act will not apply to it. The decree-holder has not to make a prayer to the court, to which he certifies the alleged payment or adjustment, that the same should be recorded. His duty is finished as soon as he has given the intimation to the court. After an intimation has been given, it would be the duty of the court to make a record of the fact that an adjustment or payment has been made. My answer, therefore, to this question is in the negative.

On point No. 2 my answer is again in the negative. If there is no rule of limitation, the decree-holder must be in a position to be able to certify payment, even after the decree should appear, on ignoring the payment certified, as time-barred. My answer is accordingly.

Point No. 3. On this point, it should follow from my answer on the foregoing two points that the certification may be one minute before the filing of the application for execution and it may be made simultaneously with the filing of the application. If this be so, there should be no difficulty in accepting the statement of the decree-holder, contained in the execution application under clause (e), rule 11 of order XXI of the Civil Procedure Code, that a certain payment or adjustment has

been made, as a certificate required by rule 2 of the same order. The argument that, if a statement contained in an application for execution was to be taken as good enough for the purpose of certification there would be no need for enacting rule 2 of order XXI, has, in my opinion, no force. The need for certification under order XXI, rule 2, would still be there, even if no occasion should arise for making an application for execution. My answer, therefore, is as indicated above.

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Point No. 4. This question has been framed in view of the fact that although the execution application, in the case out of which this reference has arisen, contained the payments alleged by the decree-holder, he filed a certificate after the judgement-debtor raised the plea of limitation. The object of that certificate was to remove any formal obstacle that might be in the way of the decree-holder proving the alleged payments, if the statement contained in the application itself be treated as an insufficient certificate. The question therefore is :—“If there be no previous certificate contained in the execution application, can a decree-holder, after the judgement-debtor has raised the objection of limitation, file a certificate, so as to enable the decree-holder to prove a payment, which, if proved, would save the application from the bar of limitation?” This question was answered by me in the negative in *Peare Mohan's* case (1), and I see no reason to alter the opinion then entertained by me. While it can never be doubted that the decree-holder can always tell the court that he has received a certain amount of money from the judgement-debtor or that his decree has been otherwise partially satisfied by the judgement-debtor, with the result that the decree will not be executed to the extent it has been satisfied, it should not be open to a decree-holder, when a controversy of limitation has been raised, to come for-

(1) (1927) I. L. R., 50 All., 259.

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ward with a statement (certificate) that, on account of a certain payment or adjustment, his application for execution should be treated as within time. This result must follow from sub-rule (3) of rule 2 of order XXI of the Civil Procedure Code. That sub-rule says :—“ A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognized by any court executing the decree.” This means that before a payment or adjustment can be recognized by the executing court there should be already, i.e., in existence, a certificate of payment or adjustment or a record of the payment or adjustment. After the time for recognisance came, it would be too late for the decree-holder to make a certification. My answer to the fourth question, therefore, is that the certificate should always come before the controversy as to limitation has arisen, either on account of the judgement-debtor appearing and objecting to the decree as being time-barred, or on account of a subordinate officer officially reporting to the court that the decree is time-barred.

Question No. 5 would have been slightly differently framed, if the Bench making the reference had a correct translation of the decree before it. The question, as framed, assumes as a part of the terms of the decree that the decree-holder has the option, either to enforce payment of the entire decretal amount or not to do so, in case of default in the payment of one or more instalments. As a matter of fact, the decree in this present case, if correctly interpreted, would mean that the judgement-debtor bound himself to pay the whole of the decretal amount in case any two instalments remained unpaid on the due dates. The point of law, however, that is involved is not affected by this altered circumstance.

Article 182 of schedule 1 of the Limitation Act is the article which applies to execution of decrees.

Clause 7 of this article, which relates to instalments payable under a decree, is as follows:—"7. (Where the application is to enforce any payment which the decree or order directs to be made at a certain date) such date."

The meaning seems to be plain to me. It means that where the decree or order under execution says that a certain sum of money is to be paid on a particular date (it does not matter whether the date is expressly mentioned or is mentioned by necessary implication), the decree-holder will have three or six years' time, as the case may be, under column 2 of that article, from the date so mentioned in the decree, for realizing that amount. Where a decree or order directs that in case of a certain amount being not paid on a particular date the whole of the amount then payable shall at once be realizable, it cannot be said that the whole of the amount so payable is "a payment which the decree or order directs to be made at a certain date." The date that is mentioned in the decree or order is the date for the payment of a particular amount (instalment). Although the non-payment makes the whole balance at once realizable, there is no direction in the decree or order as to the date when the whole of the balance is to be paid. In the case of an ordinary decree directing payment of money, although the whole of the amount is payable as soon as the decree is passed, it can not be said that the decree directs that the payment should be made on a particular date. If this be so, no "certain" date having been fixed for the payment of the entire decretal amount, it can not be said that clause (7) of article 182 compels the decree-holder to apply for the recovery of the balance of the decretal amount, on the first or subsequent dates given in the decree for payment of an instalment. The argument that on default being made on 16th of June, 1921, the whole of the decretal amount became payable on 17th of June, and that, therefore, the

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decree should have been executed within three years of 17th of June, is entirely fallacious. It overlooks the fact that the date, 17th of June, is neither specified in the decree nor is it a date which is mentioned, by necessary implication, as having been fixed by the decree for payment. The result, therefore, is that the decree is executable without any bar of limitation in respect of a particular instalment within three years of the date on which the instalment falls due, irrespective of the provision making the whole of the balance payable on default.

The provision in the decree, which makes the whole of the decretal amount payable in case of one or more defaults, is only an ancillary clause and can have no independent existence. It is, therefore, not right to say that, there being no clause in article 182 which would directly apply, article 181 should apply to it. If this argument were correct, we would arrive at this anomalous position that, in the case on which the reference is based, the whole decretal amount fell due on 17th of June, 1921, and became barred on 17th of June, 1924, by the application of article 181, while by the application of article 182, column 7, the instalments of 1924, 1925 and 1926 may still be recovered. Then article 181, being a residuary article, should not be applied to the execution of a decree, for which a special article has been provided.

My answer, therefore, to this question is that the clause which makes the balance of the decretal amount at once payable does not make the whole of the amount payable on the dates fixed in the decree for payment of particular items or on the dates following such dates. The decree-holder may seek to realize either the instalments which have fallen due, within three years of the dates fixed in the decree for payment of an instalment, or the entire decretal amount then due and not already

barred by time, where the decree makes the same payable on default.

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BOYS, J.:—On the first three questions I am in entire accord with the ACTING CHIEF JUSTICE and Mr. Justice MUKERJI as to the answers to be given.

As to the first, I agree that there is no period of limitation applicable to a decree-holder certifying a payment under order XXI, rule 2, sub-rule (1) of the Code of Civil Procedure.

As to the second question, I agree that the payment need not be certified before the decree would be time-barred if the payment sought to be certified by the decree-holder had to be ignored.

As to the third question, I agree that a statement of payment made by the decree-holder in the execution application satisfies the requirements of order XXI, rule 2, sub-rule (1) of the Code of Civil Procedure, and permits him to prove that the payment was in fact made; and I would add that it is quite immaterial for this purpose in which column or in which part of the application the statement is made, provided that it amounts to a clear statement of the receipt of payment.

As to the fourth question, there is nothing to prevent a decree-holder stating, subsequently to his application for execution, that he received a certain sum prior to the application.

If such a statement was made before controversy of any sort as to limitation arose, either by a court officer reporting the application to be barred by limitation, or by objection by the judgment-debtor or otherwise, such statement may be treated as in effect an amendment of the application for execution and in view of my answer to the third question amounts to a certificate.



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But if such statement is made after controversy arose, while there is no reason why the court should refuse to allow the statement to be filed for any other purpose than that of constituting a certificate, e.g., to place on record evidence suggesting that the omission in the application for execution was a *bonâ fide* mistake, it cannot have the force of a certificate.

As to the fifth question. The question as put to us reads :—“(5) Where a compromise decree directs payment of the decretal amount by instalments on particular dates and also authorizes the decree-holder, in the case of a default in payment of one or more instalments, to realize the balance of the decretal amount at once, what are the “such dates” within the meaning of clause (7) of article 182 of the first schedule of the Limitation Act, namely, the dates fixed for the payment of the instalments or the date of the default?”

But this was due to a mistranslation of the decree. The question should read :—

“(5) Where a compromise decree (a) directs payment by instalments on named dates and (b) further directs the judgement-debtor to pay the entire balance due if he makes default as to any two successive instalments, what are the “such dates” within the meaning of article 182 (7),—the dates fixed for the payment of the instalments or the date of the default?”

The decree was for a total sum of Rs. 13,512-14-6. The decree-holder alleged payment of Rs. 11,000 (Rs. 6,000 on the 12th of July, 1918; Rs. 1,000 on the 1st of July, 1919; Rs. 2,000 on the 12th of June, 1921; and Rs. 2,000 on the 14th of June, 1923) and on that basis, Rs. 2,512-14-6 was due at the date of the application for execution. The decree-holder applied to execute for the whole balance.

But payment of the last two sums of Rs. 2,000 each was denied by the judgement-debtor and we have to answer this question on the assumption that the instalments being payable on each 16th of June, the judgement-debtor had on the 16th of June, 1921 made default as to two successive instalments and a balance of Rs. 6,512-14-6 remained.

What remedy or remedies had the decree-holder open to him on the 16th of June, 1921, and what is the law of limitation applicable to such remedy or remedies? The first step is to examine the decree. The decree gave two directions:—(1) that the judgement-debtor was to pay annual instalments on a certain specified date each year, and (2) that if he made default in respect of "any two successive instalments" the judgement-debtor was to pay up the whole balance.

"*The amount of claim*" in the application for execution of the decree is stated as follows:—"Amount of claim Rs. 12,902-6-6, costs Rs. 610-8-0. A decree for a total sum of Rs. 13,512-14-6 was passed in terms of the mutual compromise, the amount being payable in annual instalments of Rs. 1,000; in the event of default in payment of two instalments, the remaining decretal amount was made payable in a lump sum, with interest at 6 per cent. per annum, by the defendants; *thus the remaining decretal amount is Rs. 2,512-14-6, and interest from the 16th of June, 1918 to the 15th of September, 1925, Rs. 1,070. Total Rs. 3,582-14-6.*"

This may seem on the face of it an application or claim under the second part of the decree; it does quote the "default" condition, upon which occurring "the remaining decretal amount" becomes payable, and it then states the total of "the remaining decretal amount" which is claimed.

It is, of course, true that it so happens that at the time of the application the dates for all the instalments

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payable had passed and so whether the application was "for specified unpaid instalments" already due or for "the remaining decretal amount", the amount claimed in this case would be the same.

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But it is so clearly on the face of it an application under the second part of the decree that I should have difficulty in treating it as one under the first part, if I had to decide the point.

The question, however, has not been referred to us to decide under which part of the decree the application is made, so I am content to leave that to the Bench that referred the case to the Full Bench and that will decide the case, and I will give my answer on either hypothesis.

If the application be interpreted as an application under the first part of the decree for instalments due, I can see no reason for holding that the fact that the judgement-debtor had made two successive defaults and incurred the more severe penalty provided by the second part of the decree deprived the decree-holder of the right to enforce the first part of the decree and execute it at any time in respect of any instalment or instalments, his right to which was not barred by limitation. Article 182(7) is here beyond question applicable, for in the case of the direction for annual instalments the dates for payment are beyond doubt specified and "certain". The right under the second part of the decree is an additional right and not a restriction on his first right. In the present case the decree-holder could therefore have executed for the instalments of 1923 (for we have assumed that that instalment must for the purpose of our answer be treated as unpaid), 1924 and 1925.

But if the application be interpreted as an application under the second part of the decree, the case will be different. On the assumption (on which we are proceeding) that the alleged payment of Rs. 2,000 on the 12th of

June, 1921 was not made, there was undoubtedly a default in two successive payments, a default which gave the decree-holder a right to execute on the 17th of June, 1921 for the whole balance.

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Next, before we consider whether the decree-holder got by subsequent default any fresh starting point for limitation of his right to execute for the balance, it must be determined what article of the Limitation Act applied to the right to execute for the balance which accrued to him on the 17th of June, 1921.

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It is, in my opinion, quite clear that article 182 (7) cannot apply. It could only be held to apply by holding the words "certain dates" to mean "a date certain (i.e., either apparent or determinable on the face of the decree) or a date which on the happening of a particular event, which might never have happened at all, becomes certain." I can see no justification whatsoever in the language of article 182 (7) for importing the second alternative into it. The words "the decree directs to be made at a certain date" seem to me open only to the construction that the date must be specified in, or with certainty ascertainable from, the decree itself. Therefore, though the application is one of the class described in the first column of article 182, it is impossible to hold that article 182 applies to it, because none of the seven provisions in the third column is applicable to it.

It of course follows that, whether or not any two later successive defaults could be relied upon, by waiving or ignoring a prior default or defaults, the date of the second of such successive defaults would be equally not "certain" within the meaning of article 182 (7), and the question of the right of the decree-holder to waive or ignore a default does not here arise.

I would answer, then, that while article 182 (7) would apply to an application to execute in respect of and

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for particular instalments due on dates certain from the decree itself, it does not apply at all to the present application for execution which is under the second part of the decree.

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The only other article is article 181. By the second part of the decree the judgement-debtor is made liable to pay, and a corresponding right in the decree-holder to apply clearly first arose on the 17th of June, 1921, and, in the absence of any other considerations, the application would have become barred on the 17th of June, 1924.

But there is another consideration, to which I have referred (but which it was not in that connection necessary to pursue) when considering the applicability of article 182 (7) to the second part of the decree. That consideration arises upon a construction of the particular decree. The second part of the decree makes the liability of the judgement-debtor arise upon default in payment of "any two successive instalments." There is nothing whatever in this phrase to limit it to the "first two successive defaults", and such a restriction would moreover be ordinarily to the prejudice of the judgement-debtor by forcing the decree-holder to take action. This last is only a question of expediency, but, apart altogether from such expediency, I can see no justification for forcing such a construction upon the words "any two."

I hold, therefore, that the execution of the second portion of the decree is governed by article 181 and the right to apply first arose on the 17th of June, 1921, and again on the occurrence of each default (in respect of that and the previous default). Therefore, in this case the decree-holder could apply on the 17th of June, 1925 (by reason of the defaults on the 16th of June, 1924 and on the 16th of June, 1925) for execution for the balance

due (i.e., for the whole decretal amount less amounts paid and less individual instalments already barred by limitation).

I would, therefore, answer the fifth question as follows :—

If the particular application for execution be interpreted as an application under the first part of the decree to recover certain instalments already overdue, article 182 (7) applies and limitation will run in respect of each instalment from the date on which it became payable.

If the particular application for execution be interpreted as an application under the second part of the decree to recover "the balance of the decretal amount remaining unpaid", article 181 applies and limitation will run as to the whole balance unpaid from the date of the later of the last two successive instalments unpaid, the decree-holder being entitled to an order for the whole balance if his application is within three years of that date, less the amount of any individual instalments which, regarded as individual instalments, are already barred by limitation.

ORDER OF THE COURT : Q.—(1) Whether there is any period of limitation applicable to a decree-holder certifying a payment under order XXI, rule 2, sub-rule (1) of the Code of Civil Procedure?

A.—There is no such period.

Q.—(2) If not, must a decree-holder certify payment before a decree will be time-barred if the payment sought to be certified by the decree-holder be ignored?

A.—No.

Q.—(3) Whether a statement of payment made by the decree-holder in the execution application satisfies the requirements of order XXI, rule 2, sub-rule (1) of the Code of Civil Procedure and permits him to prove that the payment was in fact made?

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A.—Yes.

Q.—(4) Whether a decree-holder may certify an alleged payment after he has made an application for execution so as to be able to prove that payment in the execution proceedings?

A.—If the statement purporting to certify the alleged payment, though made after the application for execution has been made, is made before any controversy arises, either by a court officer reporting the application to be barred by limitation or by objection by the judgment-debtor or otherwise, such statement has the effect of a certificate.

But if such statement is made after controversy arose, while there is no reason why the court should refuse to allow the statement to be filed for any other purpose than that of constituting a certificate, e.g., to place on record, evidence suggestion that the omission in the application for execution was a *bonâ fide* mistake it cannot have the force of a certificate.

Q.—(5) (as re-drafted by the Full Bench) Where a compromise decree—

(a) directs payment by instalments on named dates, and

(b) further directs the judgement-debtor to pay the entire balance due if he makes default as to any two successive instalments,

what are the “such dates” within the meaning of article 182 (7), the dates fixed for the payment of the instalments or the date of the default?

A.—(MUKERJI, J., dissenting) (a) If the application is one for the payment of instalments under the first part of the decree it will be governed by article 182 (7) and the date from which limitation will run as regards each instalment will be the date on which that instalment was due.

(b) If the application is one for the remaining unpaid balance of the decretal amount under the second part of the decree it is not governed by article 182 at all but by article 181 and limitation will run from the date of the last of any two successive defaults, the decree-holder being entitled to an order for the whole balance due, less the amount of any individual instalments which, regarded as individual instalments, are already barred by limitation.

(c) In cases of this description it is undesirable to interpret the application too strictly; the court may well pay regard to the substance of the application.

### PRIVY COUNCIL.

WAJID ALI KHAN *v.* PURAN SINGH AND OTHERS.

[On Appeal from the High Court at Allahabad.]

*Pre-emption—Decree obtained by co-sharers jointly—Death of one plaintiff pending appeal—Failure to join representatives—Reversal of decree—Abatement—Rights of representatives—Civil Procedure Code, order XX, rule 14(2) and order XXII, rules 4(3) and 11.*

Where plaintiffs obtain a joint decree for pre-emption, without any adjudication under order XX, rule 14(2), of their respective rights, they each have the right to pre-empt the whole property. If one of them dies pending an appeal, and the appeal is allowed without his representatives being joined, the appeal abates as to that plaintiff, and he is entitled to possession if the pre-emption money is paid over to the defendant with the consent of the surviving plaintiffs.

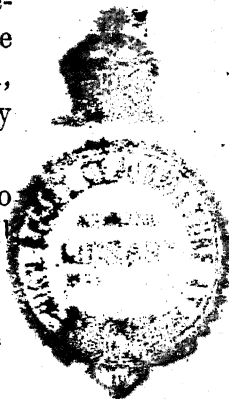
A stranger-purchaser cannot be required to submit to a partial pre-emption, nor is he entitled to demand it.

*\*Present :—*LORD SHAW, LORD CARSON, LORD BLANESBURGH, SIR JOHN WALLIS, SIR LANCELOT SANDERSON.

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Judgement of the High Court, I.L.R., 47 All., 100, varied.

APPEAL (No. 67 of 1927) from a decree of the High Court (July 11, 1924) varying an order of the Subordinate Judge of Bulandshahr.

The appeal arose out of a suit for pre-emption in which four plaintiffs obtained a joint decree for possession of the pre-empted property. On appeal the High Court had set aside the decree of the court of first instance. In the execution proceedings for the restoration of the property that followed, it was discovered that the appeal had been heard and decided in the absence of the legal representatives of one of the plaintiffs who had died during the pendency of the appeal.

The facts of the case appear from the judgement of the Judicial Committee.

The High Court (in a judgement reported in I.L.R., 47 All., 100) held that the decree on appeal had abated wholly, not merely as against the present respondents, the representatives of the deceased plaintiff. The judgement was subsequently disapproved by the Full Bench in *Mahadeo Singh v. Talib Ali* (1).

1928. June, 25. *DeGruyther*, K. C. and *Dube*, for the appellants.

*Hyam*, for the respondents.

Dec. 6. The judgement of their Lordships was delivered by Sir JOHN WALLIS :—

In this case Puran Singh, Lekhraj Singh, Amar Singh and Pirthi Singh, who were co-sharers in the village of Bighepur, filed a suit for pre-emption of certain land which the defendant Muhammad Wajid Khan, who is the present appellant, had purchased in the village. The sole question in the case was whether the custom of pre-emption obtained in the village, and the

(1) (1928) I. L. R., 50 All., 792.

Additional Subordinate Judge of Aligarh having found this issue in favour of the plaintiffs gave them a decree for possession on their depositing the pre-emption money in court. They duly deposited the money and obtained possession in execution of the decree.

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It was suggested for the first time before the Board that the fourth plaintiff Pirthi Singh, who actually deposited the money in court and obtained possession, was the only plaintiff who executed the decree, and that the right of the other decree-holders and their legal representatives to execute had become barred by limitation. In their Lordships' opinion there is no foundation for this contention. The application for execution of the decree, which was signed by all the four decree-holders, stated that the money had been deposited by them and prayed that possession might be given to them. The execution proceeded upon this basis and, in reply to objections subsequently raised by the defendant, Pirthi Singh himself stated that the decree-holders had obtained possession. It is clear, therefore, that the deposit was made and possession obtained on behalf of all the decree-holders.

The defendant appealed to the High Court at Allahabad, making all the plaintiffs parties to the appeal. When the appeal came on for hearing Amar Singh, the third plaintiff, had been dead for about a year and his legal representatives had not been brought on the record. These facts were not brought to the notice of the court, and the appeal was allowed to proceed on the footing that he was before the court, and the appellate decree recites that he had been duly represented at the hearing, whereas in fact he had died and the authority to represent him had determined. Their Lordships are not in a position to say how this regrettable omission came about, and will only observe generally that it cannot be

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too clearly understood that a practitioner who appears for several respondents, one of whom dies before the hearing of the appeal, owes a clear duty to the court to bring to its notice, if he is aware of it, the fact that one of the respondents for whom he has entered appearance is dead and no longer represented by him. Had the court been apprised of the fact, as it should have been, the questions now before the Board could have been decided at the hearing of the appeal and this subsequent litigation would have been unnecessary.

As it was, the surviving respondents allowed the appeal to be heard without objection in the absence of the third plaintiff and his legal representatives, thus taking the chance of succeeding on the merits; and when they had failed and the decree of the lower court had been reversed and the suit dismissed and the defendant had obtained formal restitution of possession in execution of the appellate decree, they joined with the representatives of the deceased third plaintiff in putting in the application to the Subordinate Judge, which is the subject of this appeal to His Majesty in Council, objecting that the whole appeal had abated by reason of the representatives of the third plaintiff not having been brought on the record within the time limited by law and that the appellate decree was a nullity and did not entitle the defendant to restoration of possession. They accordingly prayed that the order which the defendant had obtained without notice to them might be set aside and that they might be put in possession again.

On this application the Subordinate Judge ruled that the three surviving plaintiffs had no *locus standi*, as under the provisions of the Code of Civil Procedure the appeal had only abated as to the deceased plaintiff and the survivors were bound by the appellate decree. As against the representatives of the deceased plaintiff

he held that by reason of the abatement the appellate decree was not binding on them and that they were entitled to possession in execution of the decree of the first court, if the other plaintiffs acquiesced in the pre-emption money, which was still in court, being paid to the defendant, which they did by their Counsel at the hearing of the appeal from this order as stated in the judgement of MUKERJI, J. In other words, he held that the defendant was not entitled to restoration of possession as against them if they were prepared to pre-empt him.

The defendant and the surviving plaintiffs both preferred appeals against this order and the defendant also applied to the High Court under order XLVII of the Code of Civil Procedure for a review of the appellate judgement, and an order that the abatement should be set aside and the appeal re-heard in the presence of the representatives of the deceased respondent. The court rejected the grounds for review put forward by the defendant and held that the allegation that there had been a conspiracy to conceal the death of the third plaintiff from the appellant was not made out, and that he knew of the death and had been guilty of laches. They accordingly refused to set aside the abatement and dismissed the application for a review of judgement.

Consequently, as regards the deceased plaintiff, the abatement stands and cannot now be questioned.

The appeals from the order of the Subordinate Judge subsequently came on for hearing when the two learned Judges differed, MUKERJI, J., being of opinion that under the provisions of the Code of Civil Procedure the appeal had abated as regards the deceased third plaintiff and no further, and that by virtue of the abatement his representatives were entitled to a one-fourth share of the property; while DALAL, J., held that the whole appeal had abated and that the surviving plaintiffs also were entitled to be restored to possession. In

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consequence of this difference of opinion there was a reference under section 98, sub-section 2, of the Code of Civil Procedure to another Bench, which held that the whole appeal had abated and that the appellate decree was incapable of execution.

In accordance with this answer to the reference the defendant's appeal, No. 202 of 1923, was dismissed, and the appeal of the surviving plaintiffs, No. 281 of 1923, was allowed, and they were restored to possession.

The defendant then obtained leave to appeal to His Majesty in Council from the order of the High Court dismissing his appeal No. 202 of 1923.

In dealing with the questions which arise in this appeal it is desirable in their Lordships' opinion to refer in the first place to the scope and nature of the present suit. Where the custom of pre-emption obtains in a village every co-sharer has a right to pre-empt a stranger purchasing land in the village. When several co-sharers desire to exercise this right, and there are differences between them as to their shares or priorities, they may join as plaintiffs in a suit for pre-emption against the stranger-purchaser, and may obtain in that suit a decision, not only as to their right to pre-empt, but also as to their rival claims and a decree, as provided in order XX, rule 14 (2), of the Code of Civil Procedure, in accordance with which each pre-empting plaintiff will be entitled in default of the others to pre-empt alone. On the other hand, two or more co-sharers may simply sue the stranger-purchaser for pre-emption, as in the present case, without asking the court to adjudicate on their rival claims, and may obtain a decree for possession on depositing the pre-emption money in court. In their Lordships' opinion the effect of that decree is to establish, as against the defendant, the right of each of the plaintiff co-sharers to pre-empt him and to entitle them

to possession on depositing the pre-emption money, leaving them to adjust their shares and priorities among themselves, these being matters in which the defendant has no concern so long as the pre-emption money is secured to him.

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This being the nature of the suit and the effect of a decree for the plaintiffs, if the defendant files an appeal from such a decree making all the plaintiffs respondents, and one of the respondents dies before the hearing of the appeal and the appeal abates as against him under the express provisions of order XXII, rule 4 (3), of the Code of Civil Procedure, read with rule 11, because his legal representatives have not been brought on the record within the time limited by law, and the appeal is heard in the absence of the legal representatives of the deceased respondent, and the decree of the first court is reversed and the suit dismissed as against all the plaintiffs, it is clear that the legal representatives of the deceased respondent against whom the appeal has abated cannot be bound by the appellate decree and are entitled to exercise the right of pre-emption which the decree of the first court established in his favour against the defendant, that is a right to pre-empt the whole. A stranger-purchaser cannot be required to submit to a partial pre-emption nor is he entitled to demand it; and their Lordships are therefore unable to accept the view of MUKERJI, J., in the High Court that in the circumstances of this case the representatives of the deceased plaintiff only became entitled to pre-empt one-fourth of the suit property, leaving the defendant in possession of the remainder. They do not find any satisfactory grounds on which such a limited right can be based.

These were substantially the grounds on which the Subordinate Judge ruled against the defendant, and their Lordships prefer this view to that taken by the majority

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of the learned Judges in the High Court that in this suit the abatement against the deceased plaintiff made it impossible to proceed effectively with the hearing of the appeal as against the surviving plaintiffs, and rendered the judgement and decree of the appellate court passed in the absence of the representatives of the deceased plaintiff a complete nullity so that the surviving plaintiffs were entitled to be restored to possession in accordance with the decree of the first court along with the representatives of the deceased plaintiff. With this view their Lordships are unable to agree.

In their Lordships' opinion the order of the Subordinate Judge was right, and the decree of the High Court dated the 11th of July, 1924, ought to be set aside and in lieu thereof it ought to be declared that the representatives of the third plaintiff—fourth and fifth respondents here—are entitled to re-delivery of possession, on condition that the money deposited in court should be made over to the appellant with the consent of all the other respondents within three months of the date of the order herein, otherwise the suit is to be dismissed; but that there ought to be no costs either in the High Court or of this appeal, and any costs paid under the decree ought to be returned. Their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellant: *H. S. L. Polak.*

Solicitors for respondents: *Barrow, Rogers and Nevill.*

## REVISIONAL CRIMINAL.

Before Mr. Justice Ashworth and Mr. Justice King.

EMPEROR v. KUMERA AND OTHERS.\*

1928

December,  
18.

*Criminal Procedure Code, sections 110 and 117(4)—Security for good behaviour—Evidence—Admissibility—General repute—"Bad character"—Hearsay evidence—Evidence that accused was suspected of certain thefts—Evidence that accused was previously bound over to be of good behaviour.*

In a case under section 110 of the Code of Criminal Procedure a witness should not be allowed to state *merely* that an accused person is a "bad character", as that expression is too vague; but where he immediately follows this up by saying that the person habitually commits theft, there is no ambiguity about his meaning and his deposition is relevant and admissible as evidence of general repute.

Evidence of general repute must necessarily consist largely of "hearsay" evidence. The reputation of a person means what is generally said or believed about his character. A witness may depose "I believe the accused to be a habitual thief, and that is what persons of the neighbourhood generally say about him". Such evidence is admissible as evidence of general repute.

The evidence of a witness who says that *he himself suspected* the accused person of having committed a certain offence is admissible; evidence that the accused person has been so *suspected by persons other than the witness*, although it may be inadmissible for proving general repute, would nevertheless be admissible as showing one of the grounds for the witness's opinion.

The fact that a person has on a previous occasion been bound over under Section 110 may be stated and proved as one of the grounds on which the witnesses to general repute believe the accused to be a habitual offender.

\*Criminal Revision No. 765 of 1928, by the Local Government, from an order of Mohammad Ali Ausat, Additional Sessions Judge of Aligarh, dated the 16th of July, 1928.



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*Emperor v. Kurica* (1), explained. *Raham Ali v. King-Emperor* (2) and *Raj Narain Pandey v. Emperor* (3), referred to.

THE facts of the case are fully set forth in the judgment of KING, J.

The Government Advocate (Pandit *Uma Shankar Bajpai*), for the Crown.

Maulvi *Muhammad Abdul Aziz*, for the opposite parties.

KING, J. :—This is an application by the Local Government against an order made by the learned Additional Sessions Judge of Aligarh, setting aside an order made by a Magistrate of the first class requiring four persons to give security for good behaviour in consequence of proceedings under section 110, Code of Criminal Procedure.

Twenty witnesses were produced for the prosecution, including both Hindus and Muhammadans, who are respectable zamindars and mahajans. The evidence for the prosecution was to the effect that the accused are habitual thieves and burglars and that they belong to one gang and commit thefts together and that the people of Jalali, where they reside, are constantly complaining about their committing thefts. The Magistrate came to the following conclusion:—"I have considered and weighed the evidence on both sides carefully and I am perfectly satisfied with the prosecution evidence that all the accused belong to one and the same gang and habitually commit theft and burglary and that the whole town of Jalali and the people in the neighbourhood are tired of them and live in terror of them." He accordingly ordered them to furnish security for good behaviour and they appealed.

(1) (1928) 26 A. L. J., 519.

(2) (1913) 11 A. L. J., 461.

(3) (1927) 25 A. L. J., 393.

The Additional Sessions Judge, in his appellate order, referred to a decision of a Division Bench of this Court in the case of *Emperor v. Kurwa* (1) and found that, in accordance with that ruling, nearly all the evidence produced for the prosecution was inadmissible.

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King, J.

It will be convenient to consider the evidence of one witness in detail and to note how that evidence has been dealt with by the court below. I take the evidence of the first witness, Musahib Khan of Jalali, as set forth in the Magistrate's memorandum of evidence:—"I pay about Rs. 1,000 as rent. I know the accused present in court. They live in my village. Their character is bad. They habitually commit theft. They belong to one and the same gang and commit theft together. Their general repute is bad. People say that they are thieves. Kishori, Parma, Thakuri Ram, Musi Raza, Aziz-ul-Hasan, Mehdi Hasan and others had told me so. Ten months ago a theft was committed from my house and property worth Rs. 1,400 was stolen away. I had suspected the accused." (According to the Judge, who probably referred to the vernacular record, the last sentence should be read "I had suspected all the *badmashes* in the village and also the accused persons"). There was no cross-examination of this witness, although other witnesses were cross-examined.

The Additional Sessions Judge, after setting forth the substance of the above evidence, proceeds as follows:—"I have given the evidence of this witness in full in order to show that *it is all hearsay* and the only tenable point in his evidence is that a burglary took place in his house ten months ago and he suspected all the *badmashes* of the village. The learned Judges pointed out in the above ruling that a witness should not

(1) (1928) 26 A. L. J., 519.

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be allowed to state that the accused is a bad character or has the reputation of being a bad character, but in this deposition it will be seen that the witness is allowed to say that the accused's character is not good. I do not think that his evidence comes within the definition of general repute."

It appears, therefore, that the court below has swept away the whole of this witness's evidence, in so far as it implicates the accused, on the ground that it is inadmissible.

I think that the Additional Sessions Judge has misunderstood and misinterpreted the ruling cited. He takes exception to the witness's statement that the character of the persons concerned is bad. It is true that in the ruling the learned Judges remarked:—"A witness should be allowed to depose, if he can in fact give that evidence, that the accused has a general reputation as a habitual thief (or robber, etc., as the case may be) but he should not be allowed to state that the accused is a bad character or has the reputation of being a bad character." I understand this to mean that a witness should not be allowed to state *merely* that the accused is a "bad character", simply because that expression is too vague. The expression "bad character" (*badmash*) is undoubtedly vague and susceptible of many different meanings. It may mean that the person concerned is a drunkard or a gambler or an adulterer. When the prosecution sets out to prove that the accused is a habitual thief and burglar, as in the present case, it is obviously insufficient to prove merely that he is a "bad character", as that expression may not mean that he is a thief or burglar. I quite agree that a witness should not be allowed to state *merely* that an accused person is a "bad character" if he does not explain more

precisely what he means by that expression. But when a witness starts by saying that a person is a "bad character" and immediately follows this up by saying that the person habitually commits theft (as in the present case), then there is no ambiguity about his meaning, and in my opinion his deposition is relevant and admissible as evidence of general repute. The court below seems to treat the statement in the ruling, that a witness should not be allowed to state that the accused is a bad character or has the reputation of being a bad character, as meaning that a witness should not be allowed to state anything tending to show that the accused is a bad character, for example that the accused is a habitual thief, which is the fact in issue. I do not for a moment believe that the learned Judges of this Court meant anything of this kind. Such a view would obviously reduce proceedings under section 110 to a mere absurdity. I hold that the court below was wrong in rejecting the statement. "they habitually commit theft" as inadmissible.

The witness also deposed that he suspected the accused of having committed the burglary in his own house. The court below has also treated this evidence as inadmissible. Here, again, I think the Additional Sessions Judge has misunderstood the ruling. Part of the head-note runs as follows:—"In a case under section 112 of the Code of Criminal Procedure evidence cannot be led under section 110 that an accused person *has been suspected* of committing such and such offences." This does not mean, in my opinion, that a witness cannot be permitted to say that *he himself suspected* an accused person of having committed a certain offence. Such evidence would in no sense of the word be hearsay evidence and would clearly be admissible as forming one of the grounds for his belief that the accused is a habitual offender. The ruling, as I understand it,

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goes no further than to lay down that evidence cannot be given that an accused person *has been suspected by persons other than the witness* of having committed a certain offence. The ruling is no authority for the proposition that a witness cannot be allowed to state that he personally suspected the accused of having committed a certain offence, and I hold that the learned Additional Sessions Judge was wrong in rejecting such evidence as inadmissible.

There is one passage in the ruling cited,—“but evidence of general repute is evidence of a definite fact and is in no sense hearsay evidence”—which suggests that hearsay evidence is inadmissible for proving general repute. I doubt whether this is what the learned Judges really meant, but the court below seems to have interpreted their ruling in this sense, as it rejected the evidence, that people say that the accused are thieves and certain specified persons have told the witness so, as being “all hearsay”. I think the learned Additional Judge was wrong, and, if he has correctly interpreted the ruling, then I must respectfully express my dissent. Section 117 (4) expressly lays down that the fact that a person is a habitual offender may be proved by evidence of general repute or otherwise. I venture to think that evidence of general repute must necessarily consist largely of “hearsay” evidence. The reputation of a person means what is generally said or believed about his character. A witness may depose “I believe the accused to be a habitual thief, and that is what persons of the neighbourhood generally say about him.” Such evidence is admissible as evidence of general repute. So far as the witness gives his personal opinion, the evidence is not hearsay. So far as the witness gives the opinion or the statements of other persons, his evidence must, in a sense, be “hearsay”. A witness can only know the opinion of other persons by hearing them say

what they think. For this reason I think evidence of general repute necessarily consists largely of "hearsay" evidence, i.e. of statements of what persons other than the witness say or believe about the character of the accused. When a witness deposes that an accused person is generally reputed to be a habitual thief, he may be examined and cross-examined as to his means of knowledge. He may be asked who told him that the accused was a thief. In the present case the witness mentioned the names of six persons who gave him this information and I would hold that this evidence is admissible as evidence of general repute, although it is undoubtedly "hearsay" evidence of the alleged fact that the accused are habitual thieves.

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In my opinion there is nothing in the deposition of this witness which could be ruled out as inadmissible in evidence and the Judge was wrong in rejecting it. The value to be attached to the evidence is, of course, a matter for the court to determine, but the court below has rejected the evidence not because he discredits the witnesses but because he holds that the statements made by them are not admissible in evidence.

It is unnecessary to consider the evidence of all the other witnesses in detail. Their evidence is much to the same effect and the Additional Sessions Judge has accordingly rejected it on the ground of its inadmissibility.

There is one further point worth considering. Evidence was led to show that the accused persons were suspected of certain specified thefts or burglaries. In some cases the persons who suspected the accused have themselves given evidence to this effect and I think the court below was clearly wrong in rejecting such evidence as inadmissible. It is open to question, however, whether evidence that the accused has been suspected

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by persons other than the witness is inadmissible for all purposes in an inquiry under section 117. It has no doubt been held in several cases, as for instance, *Raham Ali v. King-Emperor* (1) and *Raj Narain Pandey v. Emperor* (2), that evidence of cases in which the accused is suspected is not evidence of general repute within the meaning of section 117 of the Code of Criminal Procedure. I am not prepared to challenge this proposition, but it does not necessarily follow that such evidence is not admissible for other purposes. When a witness gives evidence of general repute he is undoubtedly entitled to give his personal opinion of the person concerned. As his opinion is undoubtedly relevant, then the grounds of his opinion must also be relevant, under section 51 of the Evidence Act. A witness may say: "I believe the accused to be a habitual thief. The grounds for my opinion are, *firstly*, that he has no honest means of livelihood; *secondly*, that he associates with persons convicted of theft or burglary; *thirdly*, that he is frequently absent from his house at night for reasons which he refuses to disclose; and *fourthly*, because A, B, C and D have severally and on different occasions told me that they suspected him of having stolen their property." The last statement is inadmissible for proving that the accused committed the alleged thefts, and it may be inadmissible for proving general repute, but I think it would nevertheless be admissible as showing one of the grounds for the witness's opinion. The value to be attached to such evidence is another matter.

Another question arises, whether the fact that a man has been previously bound over to be of good behaviour as a habitual offender can be proved against him in proceedings under section 110. In the present case one of the persons with whom we are concerned in this application was convicted of burglary. Such conviction

(1) (1913) 11 A. L. J., 461.

(2) (1927) 25 A. L. J., 393.

can unquestionably be proved as tending to show that he is a burglar. The other three persons have not been convicted of any specific offence, but they have all been previously bound over under section 110. There are certain remarks in the ruling in *Emperor v. Kurwa* (1) which suggest that an order passed under section 118 cannot be proved against a person proceeded against under section 110 as evidence of his being a habitual offender, on the ground that such an order is not a "conviction". Explanation 2 of section 54 of the Evidence Act only speaks of a previous conviction as being relevant as evidence of bad character. The previous order under section 118 is not admissible under the Explanation mentioned, because it undoubtedly is not technically a "conviction", but I am clearly of opinion that it can be proved and is admissible on other grounds. The mere fact that a person has been bound over as a habitual offender certainly tends to injure his reputation. It makes people inclined to believe that he is a habitual offender, whether he is so or not. Hence the fact that a person has been bound over previously under section 110 may be stated and proved as one of the grounds on which the witnesses to general repute believe the accused to be a habitual offender. Then again, if a court has once held that a person is a habitual thief there is some presumption that he was a habitual thief at the time that the order was passed. This renders it more probable that the accused remains a habitual thief even after an interval of some years, since habits are not easily discarded. The value to be attached to the proof of a previous order under section 110 is, of course, a question for the court to consider, but I cannot see that evidence of the previous order could be held inadmissible.

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(1) (1928) 26 A. L. J., 519.



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The court below has remarked that if the accused are such notorious thieves then the police must be quite incompetent because they did not succeed in catching them red-handed. The failure of the police to catch the accused red-handed may reflect upon their competence, but I cannot see that it is any reason for refusing to bind over the accused to be of good behaviour, if it is proved that they are habitual thieves and burglars. Security for good behaviour is required in the interests of the public, who are not the less entitled to protection if the police are incompetent.

In the present case I think the evidence upon the record is ample to prove that the accused are habitual thieves and burglars and the Magistrate was justified in passing his order. Even the court below has not set aside the order upon its merits, but owing to an error of law in holding that practically all the evidence for the prosecution was inadmissible.

I would accordingly accept the application, set aside the order of the Additional Sessions Judge and restore the order of the Magistrate.

ASHWORTH, J. :—I concur. The provision of section 117 (4) of the Code of Criminal Procedure that the fact that a person is an habitual offender (i.e. an habitual doer of certain criminal acts) may be proved by evidence of "general repute or otherwise" appears to me to render the Evidence Act inapplicable to the proceedings under section 110 of the Criminal Procedure Code. Any evidence which supports or explains the fact that a person has acquired a certain reputation appears to me to be admissible. A court is not bound to bind over a person because he has a certain reputation but is bound further to consider whether he deserves such a reputation. I deprecate reference to general observations as to the evidence admissible in cases under sec-

tion 110, because such observations should only be construed with reference to the particular facts of each case. The Evidence Act offers little or no assistance for the hearing of such cases, which depend on a common-sense view of the evidence. It may generally be stated that any evidence which enables a court to come to a decision that a person is or is not an habitual offender is admissible.

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By THE COURT:—We accept the application, set aside the order of the Additional Sessions Judge and restore the order of the Magistrate.

### APPELLATE CIVIL.

Before Mr. Justice Kendall and Mr. Justice Niamat-ullah.

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BASDEO NARAIN (PLAINTIFF) v. MUHAMMAD YUSUF  
AND OTHERS (DEFENDANTS).\*

July, 10.

*Joint Hindu family—Alienation by manager—Permanent lease of agricultural lands—Suit by minor brother for avoidance and possession—Benefit to the estate—Extent of relief against agricultural lessees—Act (Local) No. III of 1926 (Agra Tenancy Act), section 45.*

The manager (elder brother) of a joint Hindu family granted a permanent lease of agricultural lands, being joint family property, to tenants at a favourable rate of rent, having taken from them a certain sum as *nazrana*. A minor brother sued for avoidance of the lease and for possession.

*Held* (1) that a permanent lease was an “alienation” of the property;

(2) that the validity of the alienation was to be judged not from whether it was a good business transaction but from whether the permanent lease or the cash *nazrana* was for the benefit of the family;

\*Second Appeal No. 2223 of 1925, from a decree of D. C. Hunter, District Judge of Allahabad, dated the 14th of September, 1925, reversing a decree of Vishun Ram Mehta, Subordinate Judge of Allahabad, dated the 26th of May, 1924.

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- (3) that the alienation being held to be invalid, the relief obtainable by the plaintiff was not that of possession by ejectment of the lessees, who were not trespassers but had become agricultural tenants, but that of getting a proper rent fixed under section 45 of the Agra Tenancy Act, 1926.

*Palaniappa Chetty v. Sreemath Daivasikamony Pandara Sannadhi* (1), referred to. *Jagat Narain v. Mathura Das* (2), followed. *Abdul Rahman v. Sukhdayal Singh* (3) and *Ram Chand v. Raj Hans* (4), distinguished.

THE facts of the case sufficiently appear from the judgement of the Court.

Dr. Kailas Nath Katju, for the appellant.

Maulvi Iqbal Ahmad, for the respondents.

KENDALL and NIAMAT-ULLAH, JJ.:—This second appeal arises from a suit brought by a minor son in a joint Hindu family for a declaration that a perpetual lease of ten agricultural plots granted by one of his brothers in 1922 is null and void as against the plaintiff, and praying to be put in possession of the property. The trial court decreed the suit on the ground that the lease was not executed for the benefit of the family in that it was not for the payment of any debts binding on the family. The lower appellate court has reversed this finding on the ground that the lease was a sound business transaction.

The facts are that this brother, Dhanwant Narain, acting as manager of the family, executed the lease at a rental of Rs. 70 a year, whereas the property had previously been leased and at any time may be leased at a rental of Rs. 125 a year. It has, however, been found though no mention of the fact is made in the lease itself, that the lessees gave the lessors what is called a *nazrana* of Rs. 1,200. It is on the strength of this *nazrana* that

(1) (1917) I. L. R., 40 Mad., 709.  
(3) (1905) 2 A. L. J., 507.

(2) (1928) I. L. R., 50 All., 969.  
(4) (1906) 3 A. L. J., 517.

the lower appellate court has found that the lease was an "excellent business transaction distinctly favourable to the family." The issue before the learned Judge, however, was not whether the transaction was a good one from a business point of view, but whether the lease was executed for the benefit of the family.

It has been argued for the respondents that the lease was only an agricultural lease, and was not an alienation and it is true that there is a clause in the lease by which the lessees become liable to ejectment if they should fall into arrears with their rent beyond a certain period, and if they are ejected on this ground they lose the *nazrana*. We do not believe, however, that this permanent lease can be regarded in any other light than as an alienation, to support which it was necessary to prove legal necessity or the benefit of the joint family estate. It goes further in the way of alienating the property than a usufructuary mortgage would have done, for the property is removed entirely from the control of the family, provided that the lessees pay the favourable rate of rent to which they have bound themselves. In the case of a usufructuary mortgage the mortgagor still retains the initiative and can recover the property by payment of the mortgage debt. No such initiative is left to the lessor under this lease. It is not denied before us that usufructuary mortgages have always been held by the courts to amount to alienations of property, and we should for this reason have held this lease to be an alienation. If any authority for such a conclusion were needed it would be supplied by the case of *Palaniappa Chetty v. Sreemath Daivasikamony Pandara Sannadhi* (1) in which it was held by their Lordships of the Judicial Committee that a permanent lease by a *shebait* of land dedicated to the worship of an idol, of which he was the trustee, was invalid on the ground that he was not

(1) (1917) I. L. R., 40 Mad., 709

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constrained to make the lease by any necessity or by the consideration of any benefit accruing to the estate from it.

\* \* \* \*

Judged by the standard laid down by the recent Full Bench decision in *Jagat Narain v. Mathura Das* (1), we are of opinion that the permanent lease in the present suit cannot be upheld. There is nothing to show that it was for the benefit of the family that it should be deprived of the chance of deriving benefit in the future from an enhanced rent. There is in fact nothing to show that ready money was wanted at all, or that the manager did not intend to spend the amount of the *nazrana* on his own pleasures. In the Full Bench case to which we have referred above a small portion of the joint family property had been sold, for a very good price, because it was difficult and expensive to manage and the object of selling it was stated to be that other land might be bought in a more convenient position, and the Bench held that this was a transaction which was for the benefit of the family estate. In the present case there is not shown to have been either any advantage in giving a permanent lease of the land or in realizing ready money. We have no doubt, therefore, that the decision of the learned District Judge on this point must be reversed and that of the trial court restored.

A further question that has arisen here is this. The plaintiff prayed for possession of the leased property, and the trial court granted this prayer. It has been strenuously argued on behalf of the appellant that this part of the decree of the trial court should also be affirmed. In the case of *Palaniappa Chetty v. Sreemath Daivasikamony Pandara Sannadhi* (2) immediate possession was given to the plaintiff. It was not, however, agricultural land that was there in dispute. Other

(1) (1928) I. L. R., 50 All., 969. (2) (1917) I. L. R., 40 Mad., 709.

cases that have been relied on by the appellant are those of *Abdul Rahman v. Sukhdayal Singh* (1) and *Ram Chand v. Raj Hans* (2). In the first of these cases the property belonged to a ward and a sale-deed was executed on his behalf without the sanction of the court. In the second case a usufructuary mortgagee had granted a lease for a period which extended beyond the period of the possession of the mortgagee. It was held that the vendee in the first case and the lessee in the second could be dispossessed by the owners. In these cases, however, the transferor was not legally vested with the right to transfer the property at all, and in the second case there was no relationship of landholder and tenant between the plaintiff and the mortgagee's lessee. In the present case it must be conceded that the manager had the power to grant leases to tenants in the ordinary course of management of the zamindari property, and there would have been nothing to prevent his granting an ordinary lease to the present lessees. It was only by granting a permanent lease that he exceeded his power. It has been suggested that the whole of the lease becomes null and void and the lessees under it, therefore, become trespassers. We have to consider, however, that the manager admitted these lessees to the occupation of the land as long ago as 1922, and that the lessees have presumably been in possession since and have been paying rent regularly. We have also to consider that the manager had legal authority to admit them to the occupation of the land. In these circumstances it seems to us that it would be altogether wrong to regard them as trespassers merely because the manager exceeded his power in executing a permanent lease. Under section 45 of the Agra Tenancy Act of 1926 "whenever any person has been admitted to the occupation of land, or permitted to retain possession of land, by anyone having

(1) (1905) 2 A. L. J., 507.

(2) (1906) 3 A. L. J., 517.

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a right to admit or permit him with the intention that a contract of tenancy should thereby be effected, but without any rent being fixed, either he or the person so admitting or permitting him may at any time during the period of his occupation or within three years after the expiry of such period sue to have rent fixed thereon." It appears to us that the position of the lessees is analogous to that of persons who have been admitted to the occupation of the land in this way. It is true that when they were admitted to the land it was not intended that the contract of tenancy should be effected by the mere admission, but by a written contract which has been held to be invalid. But it was intended that a contract of tenancy should be effected, and we think that it would be doing violence to the meaning of the words if in these circumstances we were to regard the lessees as trespassers and to eject them from an agricultural holding. There can be no doubt that the relationship of landlord and tenant has been established between them.

The result is that we allow the appeal in part and give the plaintiff appellant a declaration that the permanent lease is null and void and ineffectual as against him, but we dismiss the suit in regard to the prayer for possession. It will be for the parties to settle their rights and liabilities as to rent in the revenue court. As regards the *nazrana* it is not clear from the findings of the courts below whether the amount has been repaid to the lessees, but if not they will be able to recover it in a regular suit. The plaintiff appellant will receive half his costs throughout from the respondents.

*Decree modified.*



*Before Mr. Justice Kendall and Mr. Justice Niamat-ullah.*

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(DEFENDANT) *v.* ALLADIN (PLAINTIFF).\*

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July, 10.

*Act No. VIII of 1873 (Northern India Canal and Drainage Act), sections 8, 10 and 67—Jurisdiction—Suit for damages—Powers and duties of Canal Department—Riparian owner—Flooding of adjoining lands—Negligence.*

A canal constructed by Government about 1860 had to cross the bed of a hill stream. A super-bridge with embankments was constructed for passing the water of the stream above the canal and thence flowing it on in a certain direction, and embankments were also constructed at the place where the stream left the superbridge, the embankments preventing the water overflowing and flooding the adjoining lands. The accumulation of silt used to be removed by Government from time to time, up to the year 1917, when the practice was discontinued, and the consequent accumulation of silt caused the water of the stream to overflow its banks in 1922, flooding and injuring the lands in the neighbourhood, of which the plaintiffs were the agricultural tenants. They brought a suit against the Government for damages and for an injunction.

*Held*, (1) the civil court had jurisdiction to try the suit, and there was nothing in the Northern India Canal and Drainage Act against such jurisdiction.

(2) The Canal Department had power to concentrate the waters of the stream and to carry them over the canal by the super-bridge; they had also the power, if they so chose, to remove the silt and maintain the height of the banks and thereby to prevent flooding of the neighbouring lands and injuring the rights of the occupiers thereof. They failed to exercise this power when they discontinued their practice of removing the silt, and the discontinuance was not warranted by any authority derived from any legislative enactment and amounted to negligence, and they were liable for the damages resulting therefrom.

(3) The fact that the plaintiffs became the tenants of the lands after the discontinuance did not disentitle them to

\*Second Appeal No. 2058 of 1925, from a decree of Shankar Lal, Additional Subordinate Judge of Saharanpur, dated the 22nd of April, 1925, confirming a decree of Sheo Narain, Munsif of Saharanpur, dated the 30th of July, 1924.



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the damages, as the duty of the canal department regarding the removal of silt was a pre-existing one.

*Sankaravadicela Pillai v. Secretary of State for India in Council* (1), *Geddis v. Proprietors of the Bann Reservoir* (2), and *Bligh v. Rathangan River Drainage Board* (3), followed. *Cracknell v. The Mayor and Corporation of Thetford* (4) and *Lagan Navigation Co. v. Lambeg Bleaching etc. Co.* (5), distinguished.

THE facts of the case are fully set forth in the judgement.

The Government Advocate (Pandit *Uma Shankar Bajpai*), for the appellant.

Babu *R. C. Ghatak*, for the respondent.

KENDALL and NIAMAT-ULLAH, JJ. :—This and the connected appeals arise out of six suits brought by plaintiffs, who were non-occupancy tenants in the district of Saharanpur, for damages against the defendant, the Secretary of State for India in Council, and for injunction. The suits have been decreed by the courts below for varying amounts of damages, but the relief of injunction has been disallowed. The defendant preferred these second appeals. The plaintiffs have acquiesced in that part of the decree which dismissed their claim to injunction.

The circumstances which led to the institution of the aforesaid suits are these :—The Gangetic canal was made by Government in 1860 or thereabouts. At a certain point near Saharanpur it crossed the bed of a torrent of rain water, called Rao Pathri, descending from the mountainous regions in the vicinity. To prevent the stream and the canal intersecting each other and the resulting damage to the canal works, a super-bridge was constructed to let the stream pass across the canal and

(1) (1904) I. L. R., 28 Mad., 72. (2) (1878) L. R., 3 A. C., 430.  
(3) (1898) 2 Ir. R., 205. (4) (1869) L. R., 4 C. P., 629  
(5) (1927) A. C., 226.

thence to flow on in a certain direction. To achieve this end the stream had to be diverted from its bed at a point further up, at some distance from its junction with the canal. This was necessary, apparently because the place where the canal intersected the old bed of the stream was deltaic, and the passage of water over the super-bridge at that place would have been difficult to control. Across the canal where the stream left the super-bridge, as on the super-bridge itself, embankments were constructed on either side to prevent the overflow of water and to avoid the submergence of neighbouring lands. For this device to be successful the silt, which would in course of time raise the level of the bed of the stream, especially along the super-bridge, reducing the height of embankments from such bed, should be periodically removed. It was alleged by the plaintiffs respondents that this device was meant to protect the neighbouring lands against possible overflow of water, but it was maintained on behalf of the defendant that it was for their own purposes that the embankments had been erected and silt was removed from time to time. But whether the main object was one or the other, it is not disputed that as long as the arrangement referred to lasted, the lands in the neighbourhood were not overflowed. It is not material whether the resultant protection was only incidental, or whether it was the primary object of the construction of the embankments and of the periodical removal of the silt. It has been found as a fact that silt used to be removed by the Canal Department whenever it was found necessary to do so up to the year 1917, when the practice was discontinued, and in the course of a few years the deposit of silt was so great that the water of the stream overflowed its bank and passed on the plaintiffs' lands which were on a lower level, causing injury to their crops in 1922. The suits in question were brought by

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tenants who were adversely affected by the overflow of water, for damages against the Secretary of State, on the allegation that the injury complained of was the direct consequence of the failure of the Canal Department to so control the stream by removal of silt deposit as to allow the stream to flow in its channel instead of cutting through the plaintiffs' lands.

The defendant's appeals have been pressed on three grounds, namely (1) that the civil court has no jurisdiction to award the compensation claimed; (2) that the defendant appellant was not responsible to remove the silt or to take any other step to prevent the passage of water on to the plaintiffs' lands in the ordinary course of nature, and that the loss, if any, suffered by the plaintiffs, is the outcome of *vis major*; and (3) that the plaintiffs tenants having obtained ordinary tenancy leases in respect of the lands damaged, after 1917, with their eyes open, cannot claim damages for what they could have easily anticipated.

As regards the question of jurisdiction, certain provisions of the Canal and Drainage Act (VIII of 1873) are relied on as ousting the jurisdiction of the civil court.

[The judgement then considered the provisions of sections 8; 10 and 67 of the Act and continued thus :—]

The plea as to jurisdiction has no force and was rightly ignored by the courts below.

The next question of importance is whether the defendant is liable to compensate the plaintiffs for loss suffered by the latter in consequence of the water of Rao Pathri flowing on to the plaintiffs' lands which lie to the right of the stream below the super-bridge. The present situation is thus described by the court of first instance which inspected the locality :—"I inspected the locality and the position has now become thus, that even the slightest flow causes the water to flow towards

the plaintiffs' lands. The water cannot at all go towards and along its former channel. The loss to the plaintiffs cannot be said to be due to any abnormal flow."

It appears that the matter had attracted the attention of the Canal authorities some time in 1884 and the expert advice then given was against the manner in which it was proposed to control the stream, and apprehensions were then entertained that the neighbouring lands were exposed to the risk of being flooded owing to the anticipated deposit of silt. To obtain permanent security an alternative scheme was suggested by more than one Engineer, which was, however, not adopted, apparently on the score of economy. The periodical removal of silt prevented untoward results happening in that neighbourhood till 1917, when the Canal authorities seem to have taken a different view of their responsibilities, and the practice of removing silt, which entailed expense and which was unnecessary for their own purposes, was discontinued. A few years later matters were brought to a head, when in 1922 the plaintiffs' crops were damaged by the flow of water from the stream below the canal crossing.

It is argued for the appellant that on the facts as stated no action for damages is maintainable against what is said to be an act of State. Reliance is placed on Halsbury's Laws of England, Vol. 1., p. 14, paragraph 16, where the following rule has been deduced from English cases :—" There are also a number of cases in which the legislature in authorizing the construction and carrying on of works (especially works of public utility) necessarily interferes with the existing rights of individuals. Where an Act of Parliament authorizes the use or the doing of a particular thing, and the thing is used or done for the authorized purpose, any damage resulting therefrom and not due to negligence or unreasonable

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conduct is *damnum absque injuria* and no action will lie therefor."

In the first place there is no Act of the legislature specifically relating to the stream Rao Pathri and ensuring immunity from consequences of the omission complained of in these cases. On the contrary, the Indian Statute Book abounds in provisions for compensation for injury to private property resulting from the execution of works of public utility. In the second place it cannot be held that the damage resulting from the inaction of the Canal Department was not due to "unreasonable conduct or negligence". The abandonment of the practice of removing silt from time to time, which continued for nearly half a century, with no other precaution being substituted therefor, cannot be described otherwise than as "unreasonable," especially in view of the note of warning that had been sounded by certain experts alluded to before. The rule has been elaborately stated by SUBRAHMANIA AYYAR, J., in *Sankaravadivelu Pillai v. Secretary of State for India in Council* (1), where he observes:—"The law with reference to liability of such persons was considered in *Canadian Pacific Railway v. Parke* (2), where the leading authorities on the point were referred to and explained by Lord WATSON, who delivered the opinion of the Judicial Committee. The cardinal rules deducible from them may be formulated thus:—

- (i) Wherever, according to the sound construction of a statute, the legislature has authorized a person to make a particular use of property and the authority given is in the strict sense of the law *permissive* merely and not *imperative*, the legislature must be held to have intended that the use sanc-

(1) (1904) I. L. R., 28 Mad., 72(78). (2) (1899) A. C., 535.

tioned is not to be in prejudice of the common law rights of others.

- (ii) But where the authority given is *imperative* the person so authorized incurs no responsibility however much injury he may cause to another, so long as he is not convicted of negligence.

- (iii) The burden lies on those who seek to establish that the legislature intended to take away the private rights of individuals, to show that by express words or necessary implication such an intention appears.

The task of arriving at a conclusion as to the permissive or imperative character of an authority in a given case being by no means free from difficulty even where it depends solely on the words of a statute, that must obviously be the more so where the conclusion has to be arrived at with reference to unrecorded custom and practice very rarely brought up for discussion and decision before courts and with reference to which only the rights and obligations of the State in this country in regard to public irrigation have to be postulated."

No authority derived from any legislative enactment can be cited to warrant the course adopted by the Canal Department, which is obviously detrimental to the interest of persons owning or occupying land within the area likely to be affected by the action of Rao Pathri below the canal-crossing, where the stream has been practically let loose to flow in any direction and in any number of smaller streams. The Government have undoubtedly the right to alter the course of a stream, but in so doing it cannot countenance injury to private property to avoid expense or inconvenience to its officers. The case above referred to is practically on all fours with the one that

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has to be decided in these appeals. There a "calingula" was constructed in 1882 by Government for the purpose of reducing the flow of water into a tank through a channel. The necessary effect of the calingula would have been to cause the water diverted from the channel to flood the plaintiffs' land. To obviate this, a small drainage channel was formed by Government to carry off the surplus water. Plaintiffs contended that the drainage channel was not sufficient to carry off the water and that the water which flowed over the calingula stagnated on their lands and made them unfit for cultivation. They prayed for a mandatory injunction directing that the calingula be blocked up: It was held that they were entitled to the relief claimed. Government have the right to distribute the water of Government channels for the benefit of the public, subject to the rights of a ryotwari landholder, to whom water has been supplied by Government, to continue to receive such supply as is sufficient for his accustomed requirements. But the rights of Government, in connection with the distribution of water, do not include a right to flood a man's land because, in the opinion of Government, the erection of a work which has this effect is desirable in connection with the general distribution of water for the public benefit. The fact that the opening of the calingula was necessary for the protection of the tank and the fact that there was no negligence in the construction of the calingula—so far as the calingula was concerned—did not deprive the plaintiffs of their right to have their property protected.

The learned Government Advocate on behalf of the appellant has referred us to a well known English case which at first sight appears to favour his argument. In *Cracknell v. The Mayor and Corporation of Thetford* (1), the defendants were empowered by an Act of Parliament

(1) (1869) L. R., 4 C. P., 629.



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to render navigable a certain river, and in the exercise of their power under the Act they erected staunches in the river, and the result of these combined with the natural growth of weeds in the river and the accumulation of silt against the staunches was that the river overflowed its banks and damaged the plaintiff's land. It was held that there was no obligation on the defendants to cut the weeds or remove the silt unless it was necessary to do so for the benefit of navigation. This has been pointed to as a parallel case to the present one. There was, however, one important consideration there, which does not appear from the headnote in the printed report, and that was that the defendants were not invested by the Act with any power for draining or for maintaining the flow of water except for the purpose of navigation. In fact it was pointed out that if the defendants had done any act on the soil for any other purpose than that of improving the navigation they might have been guilty of trespass, and further that the removal of the accumulation though it might have been injurious to one landholder might have been beneficial to another. In short, whereas the defendants had every right, and in fact were bound, to erect the staunches under the provisions of the Act, they had no right to remove the weeds or the silt and they could not therefore be held to have been negligent or to be liable for damages on account of their omission to do so. That decision was dated 1869 and has constantly been referred to in the English decisions of later date. In the case of *Geddis v. Proprietors of the Bann Reservoir* (1), the facts were not dissimilar to those of the present case. The defendants were invested by Statute with certain powers for the purpose of securing a regular and proper supply of water to some mills. They erected a reservoir in accordance with their powers, and collected the waters of various streams and

(1) (1878) L. R., 3 A. C., 430.



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sent them through the channel of the river *M* to supply another river *B*, all of which they were entitled to do under the Act. After a time they neglected to cleanse the channel of the river *M*, so that at times it overflowed its banks and damaged the land of the adjoining proprietors. In the course of hearing, the case of *Cracknell v. The Mayor and Corporation of Theftford* (1) was relied on by the defendants. It was argued for the plaintiffs that there was an obligation cast upon the defendants, whether under the express provisions of the Act or not. In distinguishing the case from *Cracknell's* case, Lord HATHERLY remarked that the respondents (defendants) "have the power to execute a work of this description and to make channels and cuts, and not only so but they have also the power to widen and deepen cuts and watercourses. Having that power, and having the power to use those watercourses to communicate between the reservoir and river Bann, they have chosen to exercise that power in a manner injurious to the plaintiff, owing to their not having seen in the first instance the necessity of making provision for the additional quantities of water that would be sent down and at the varying periods in which they would be sent down"; and a little further on his Lordship added that persons in the position of the defendants "should use every precaution, by the exercise either of their powers created by the Act of Parliament itself or of their common law powers, to prevent damage and injury being done to others through whose properties the works or operations are to be carried on, and to avoid subjecting them to consequences which they were not bound to anticipate from the Act of Parliament, seeing that the Act also enabled the parties who had the power to do so to prevent the mischief." If we apply the same principles to the present case we find that although the Canal Department may have been empower-

(1) (1869) L. R., 4 C. P., 629.

ed to concentrate the waters in the delta and to carry them over the canal by the super-bridge, if that was necessary for the protection of the canal, yet when they failed to repair the embankments which they had constructed to the south of the canal, they undoubtedly failed to do something which they had the power to do, and which would have prevented injury to the plaintiffs. A very similar case of a later date is that of *Bligh v. Rathangan River Drainage Board* (1), which is perhaps an even closer parallel to the present case. In this the defendants were held liable, and Sir O'BRIEN, L.C.J., remarked: "If by a reasonable exercise of their powers under the statute they (defendants) could have prevented the damage complained of, and, by reason of their neglect in putting these powers into operation, the damage arose, they are responsible. In that case they cannot justify under the statute." The last case to which we shall refer is that of *Lagan Navigation Company v. Lambeg Bleaching, Dyeing and Finishing Co Ltd.* (2). The Navigation Company were required by a Local Act to keep the navigation and locks etc., of a canalized river in an efficient state for traffic, and in 1912 they raised the coping on both sides of one of their locks and the backs behind it to prevent the locks from being flooded. The result was that the land of the Bleaching Company was flooded and they cut away a portion of the bank to allow the water to escape. It was held that the Navigation Company in constructing works in the exercise of the statutory powers for the protection of their navigation were not liable for the flooding of the respondents' land. In re-stating the principles laid down in the cases of *Geddis v. Proprietors of the Bann Reservoir* (3) and *Bligh v. Rathangan River Drainage Board* (1), Lord ATKINSON remarked: "These cases

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(1) (1898) 2 Ir. R., 205.

(2) (1927) A. C., 226.

(3) (1878) T. R., 3 A. C., 430.

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establish, I think, the principle that if a man or a public body have statutory powers which he or they may at will exercise in a manner hurtful to third parties or in a manner innocuous to third parties, that man or body will be held to be guilty of negligence if he chooses or they choose the former mode of exercising his or their powers and not the latter, both being available to him or them." His Lordship goes on to point out that in the two cases named the defendants had an option as to which of the two methods they would choose in the exercise of the statutory powers they possessed, and they chose the method which caused damage to a third party. In the case under appeal before their Lordships, however, the Navigation Company either had to erect the banks to protect their own lands from being flooded and to secure that the navigation of the lock should not be interfered with or impeded, or to utterly disregard the obligations imposed on them by the statutes from which they derived their powers. They had, therefore, no choice and were not liable to damages. It may be added that in the case of *Cracknell v. The Mayor and Corporation of Thetford* (1) the position appears to have been the same as in this last case.

These then are the principal authorities of the English law on the questions that arise in the present case. There can be no doubt that the canal authorities had the option either of maintaining the bank and clearing the silt or of neglecting to do so, and they chose the latter; and the English decisions afford no support to the contention of the appellant.

The third ground was not taken in the written statement, or in the grounds of appeal either in this Court or in the lower appellate court, but it appears to

(1) (1869) L. R., 4 C. P., 329.

have been argued before the lower appellate court. It does not appear to us to have any force. When the tenants took their leases the appellant,—the Canal Department—was under an obligation to keep up the embankment and to clear the channel. The tenants, therefore, had every right to believe that the Canal Department would fulfil their obligation. It has not been suggested that the land was damaged before the tenants took their leases. In the circumstances of the case and in view of the facts already stated the conclusion arrived at by the courts below was justified. These appeals therefore fail and are dismissed with costs.

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### FULL BENCH.

*Before Mr. Justice Boys, Mr. Justice Kendall and Mr.  
Justice King.*

HANUMAN PRASAD SINGH (PLAINTIFF) v. MATHURA  
PRASAD SINGH (DEFENDANT).\*

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June, 6.  
July, 11.

*Joint property—Co-sharers in zamindari and sir—Separate possession of one co-sharer over a part—Suit for joint possession by co-sharer out of possession—Form of relief—Discretion of court.*

A decree for joint possession can be granted to one co-sharer against another under the provisions of the Code of Civil Procedure of 1908 even though the plaintiff has not been in actual possession.

The court has some discretion in the matter of granting such a decree, as exemplified in the case of *Watson and Co. v. Ramchund Dutt* (1), and it has to be exercised by considering the rights and interests of the parties; and a decree for joint possession cannot be refused on the mere ground that it would be impracticable or inadvisable for reasons unconnected with the rights of the parties.

Where parties were joint owners of several zamindari properties, out of which certain *sir* plots had been in the separate

\* Appeal No. 11 of 1925, under section 10 of the Letters Patent.

(1) (1890) I. L. R., 18 Cal., 10.

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possession of the defendant for over 24 years, and the plaintiff used to get his share of the profits of those plots from the defendant, and the defendant never denied the plaintiff's title, *held*, the court should, in its discretion, refuse to disturb the defendant's possession by giving the plaintiff a decree for joint possession.

*Watson and Co. v. Ramchund Dutt* (1), followed. *Jagar Nath Singh v. Jai Nath Singh* (2), *Jagarnath Ojha v. Ram. Phal* (3), *Ram Charan Rai v. Kauleshar Rai* (4) and *Bhairon Rai v. Saran Rai* (5), referred to. *Bisheshar Singh v. Hanuman Singh* (6), *Sarabjit Singh v. Raj Kumar Rai* (7) and *Bhargunath Rai v. Apnarain Rai* (8), distinguished.

THE facts of the case sufficiently appear from the judgement of the Court.

Maulvi Iqbal Ahmad and Munshi Shiva Prasad Sinha, for the appellant.

Munshi Binod Bihari Lal, for the respondent.

BOYS, KENDALL and KING, JJ.:—The two questions that have been referred to the Full Bench arise from a suit for joint possession of certain *sir* plots in the village of Baraon. Other reliefs were claimed by the plaintiff, but with these we are not concerned. The two parties to the suit are members of a Hindu family which has been found to be still in some respects a joint family. They own properties in several villages, and it appears that although there has never been any regular partition between them, they have in fact held some of these properties separately, and there is a clear finding that the defendant has been in separate possession of the *sir* plots in the village of Baraon for 24 years and has been paying profits in respect of these plots to the plaintiff. The plaintiff's suit was for a declaration of his title to a half share in the *sir* plots, and also for joint possession, and the two lower courts decreed his suit for a declaration

(1) (1890) I. L. R., 18 Cal., 10.

(3) (1911) I. L. R., 34 All., 150.

(5) (1904) I. L. R., 26 All., 533.

(7) (1921) I. L. R., 44 All., 5.

(2) (1904) I. L. R., 27 All., 88.

(4) (1904) I. L. R., 27 All., 153.

(6) (1921) I. L. R., 44 All., 1.

(8) (1922) I. L. R., 45 All., 157.

but found that he was not entitled to actual possession. The learned Judge of the High Court before whom the matter came in second appeal upheld these findings on the ground that under rule 35 of order XXI of the Code of Civil Procedure a decree for joint possession is now executed only by affixation of a warrant on a conspicuous part of the property, and by proclamation by beat of drum etc.; and that a decree for joint possession is only in the nature of a declaratory decree, and in effect would be of no use to the plaintiff. An appeal against this decision was filed under section 10 of the Letters Patent and the Bench has referred the following two specific questions to us for decision :—

(1) Whether a decree for joint possession can be granted to one co-sharer against another co-sharer under the provisions of the Code of Civil Procedure of 1908 even though the former has not been in actual possession?

(2) Whether the court has any discretion in the matter (apart from the case where co-sharers have been in separate possession by consent or acquiescence) to refuse to grant a decree on the ground that it would be impracticable or inadvisable?

The parties to these proceedings are joint owners of shares in several mahals and not merely co-sharers in a single mahal, but we do not believe that this makes any material difference in the decision of the questions before us.

The leading case on the subject is that of *Watson and Co. v. Ramchund Dutt* (1), decided by the Privy Council in 1890. In that case their Lordships refused to give a decree for joint possession to a joint owner, not, it is to be observed, because the law did not provide the machinery for the granting and the execution of such a

(1) (1890) I. L. R., 18 Cal., 10.

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decree, but because the circumstances of the case did not warrant the court in justice, equity and good conscience in giving the plaintiff that relief. In the judgement Sir BARNES PEACOCK remarked: "It seems to their Lordships that if there be two or more tenants-in-common, and A be in actual occupation of part of the estate and is engaged in cultivating that part in a proper course of cultivation as if it were his separate property, and B another tenant-in-common attempts to come upon the said part for the purpose of carrying on operations there inconsistent with the course of cultivation in which A is engaged and the profitable use by him of the said part, and A resists and prevents such entry *not in denial of B's title* but simply with the object of protecting himself in the profitable enjoyment of the land, such conduct on the part of A would not entitle B to a decree for joint possession." After remarking on the waste and deterioration in the value of land that might follow in India if the courts were invariably to give such decrees without a full consideration of the circumstances, the judgement proceeds: "In Bengal the courts of justice, in cases where no specific rule exists, are to act according to justice, equity and good conscience, and if, in a case of shareholders holding lands in common, it should be found that one shareholder is in the act of cultivating a portion of the lands which is not being actually used by another, it would scarcely be consistent with the rule above indicated to restrain him from proceeding with his work, or to allow any other shareholder to appropriate to himself the fruits of the other's labour or capital."

We believe that the materials for an answer to both of the questions referred to us are to be found in this judgement, but we propose to review briefly some of the cases which have come before this Court in recent years, in order to see how the principles laid down by the Privy Council have been applied.



In the case of *Jagar Nath Singh v. Jai Nath Singh* (1) the court refused to give the plaintiff a decree where the defendant had entered into possession of the "derelict land" which belonged to him and his co-sharers, without doing anything illegal. In that case the Bench appears to have been of opinion that the court had no power to give a decree for joint possession unless the plaintiff had been illegally ousted. The next case to which we have been referred is that of *Jagarnath Ojha v. Ram Phal* (2), in which a decree for joint possession was given. The appeal was referred by Mr. Justice (now Sir Edward) CHAMIER to a Division Bench because he found that in some cases the court had refused to give a decree for joint possession, and in his order he referred to the case of *Watson and Co. v. Ramchund Dutt* (3) as authority for the propositions that a decree for joint possession could be given and the decision must depend on the circumstances of the case, and that it is important to ascertain whether what the defendant is doing with the land is done *in denial of the plaintiff's title*. In the case before him the defendant had all along denied the plaintiff's title, and the Division Bench gave the plaintiff a decree for joint possession, remarking however that "there may no doubt be cases in which the court may not deem it reasonable in the interests of all the parties concerned to make a decree for joint possession," though they do not give any precise indication of the kind of considerations by which the court should be guided. We can have little doubt, however, that they believed the guiding principles to be those set forth in the case of *Watson and Co. v. Ramchund Dutt*. In three more recent cases which have been relied on in argument before us decrees for joint possession have been given. In the case of *Bisheshar Singh v. Hanuman Singh* (4) the parties had been in

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(1) (1904) I. L. R., 27 All., 38.

(2) (1911) I. L. R., 34 All., 150.

(3) (1890) I. L. R., 13 Cal., 10.

(4) (1921) I. L. R., 44 All., 1.



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joint possession of the land until 1324 F. but in the following year the defendant had ousted the plaintiff. In the case of *Sarabjit Singh v. Raj Kumar Rai* (1) the parties had been jointly cultivating the land in dispute till 1318 F., after which a tenant was put in cultivatory possession on behalf of both parties until 1321 F., after which the defendants ousted the plaintiffs, apparently by getting the joint tenant to surrender the land separately to them, and the court gave the plaintiffs a decree for joint possession. In the case of *Bhirgunath Rai v. Apnarain Rai* (2) the defendants were alleged to have dispossessed the plaintiff by collusion with some non-occupancy tenants, and the learned Judges remarked: "In the present case the learned Judge of the lower appellate court has stated in his judgement that a decree for joint possession might lead to considerable difficulty and trouble by reason of the parties not being on good terms. In every case in which one co-sharer forcibly dispossesses another or keeps another co-sharer out of possession there is undoubtedly a good deal of bad feeling between them, but that is no reason for depriving a plaintiff of possession to which he is entitled. No doubt there may be cases in which joint possession ought not to be granted."

In every one of these cases in which a decree for joint possession has been given there appears to have been an ouster of the plaintiff by the defendant. That there has always been a definite denial of the plaintiff's title is not so clear, but where the circumstances showed that force had been used, or where fraudulent collusion had been detected, there must always have been an implied denial of the plaintiff's title. We have not been shown any cases in which the courts have given a decree for joint possession in circumstances like those disclosed in the present suit, where the defendant has been in

(1) (1921) I. L. R., 44 All., 5.

(2) (1922) I. L. R., 45 All., 157.

separate possession with the acquiescence of the plaintiff for a large number of years and has never denied the plaintiff's title.

We may turn now to the two questions which have been put to us and answer them as follows :—

(1) A decree for joint possession may certainly be granted to one co-sharer against another. Such decrees were given before the Code of Civil Procedure of 1908 came into force, and the rule introduced in that Code (rule 35, order XXI) merely defines the manner in which such a decree is to be executed. Such a decree may undoubtedly be given even where the plaintiff has not been in actual possession. Mr. Justice AIRMAN, in the case of *Ram Charan Rai v. Kauleshar Rai* (1), remarked : "If a decree can be passed to put back a plaintiff into joint possession I see no reason why it should be considered impossible to pass a decree for joint possession in the case of a plaintiff who has never been in possession. Whether such a decree ought to be passed is another question." These remarks were endorsed in the referring order in the case of *Jagarnath Ojha v. Ram Phal* (2).

(2) That the court has some discretion in the matter of granting a decree is obvious from the decision of the Privy Council in the case of *Watson and Co. v. Ramchand Dutt*, but we can find no authority in that judgment for holding that in the exercise of their discretion the courts are to be guided by any other consideration than the rights and interests of the parties concerned. Such considerations as the danger of a riot or criminal proceedings have really nothing to do with the rights and interests of the parties *inter se* and should not, we consider, be entertained by a civil court. The question whether the court has any discretion to refuse to grant a

(1) (1904) I. L. R., 27 All., (2) (1911) I. L. R., 34 All., 150.  
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decree in such a case on the ground that it would be impracticable must be answered in the negative. If the plaintiff is entitled to a decree in accordance with the principles of justice, equity and good conscience as laid down in the decision of the Privy Council, we consider that the court must give him a decree whether it believes that it would be useful to him or not. As has been pointed out in the referring order, even if the decree has not the effect of putting him in actual physical possession of the disputed property, it would greatly strengthen his position in the revenue court, and the very fact that the procedure for executing such a decree has been specifically laid down in the Code of Civil Procedure shows that the legislature did not believe that the decree would be impracticable. As regards the second part of the question, whether the court has any discretion to refuse a decree on the ground that it would be "inadvisable", it might be said that their Lordships of the Privy Council were influenced by the question of advisability when they discussed the damage that might be done to the land if in certain cases the defendant's possession were to be disturbed. They were, however, mainly guided by the facts that the defendant had not denied the plaintiff's title, and that he had been in peaceful possession and had earned a right to protect himself in the profitable use of the land for good husbandry. We think, therefore, that we may answer this part of the question by saying that the court has no discretion to refuse a decree merely on the ground that it would be inadvisable for reasons unconnected with the rights of the parties.

Let the papers be returned to the referring Bench.

The case then came before the referring Bench, and the following judgement was delivered:—

SULAIMAN, A. C. J. and WEIR, J :—In this case the plaintiff's claim for joint possession had been disallowed by the court below. The refusal of that relief was up-

held by a learned Judge of this Court on the ground that the decree for joint possession is only in the nature of a declaratory decree and does not materially differ from it in view of the new provisions of the Code of Civil Procedure. If that view were correct we would have been bound to dismiss the claim for joint possession without considering the merits any further. Under the old Act it had been held by a Full Bench of this Court in the case of *Bhairon Rai v. Saran Rai* (1) that if a plaintiff had been in joint possession of some property and had been illegally ousted from joint possession of any portion of that property by a co-owner, he was entitled to be restored to such joint possession. There was, however, some conflict of opinion under the new Code. Without going into the question whether this was a fit case or not for refusal to grant such a relief we referred two questions of law for consideration by a Full Bench. The answers received make it clear that even under the new Code a court has jurisdiction to pass a decree for joint possession where the plaintiff has not been in actual possession; but that there is some discretion in the matter of granting such a decree, which has to be exercised by considering the rights and interests of the parties concerned and the decree for joint possession cannot be refused on the mere ground that it would be impracticable.

We must accordingly examine the facts of this case and the findings of the court below. In the written statement the defendant did not expressly deny the plaintiff's title. On the other hand, it was admitted that they were joint zamindars. The main point taken in paragraph 18 was that the *sir* and waste lands had been in exclusive possession of the defendant, and the plaintiff had no right to get actual possession thereof. The position was made clear, further, by a statement of the counsel for the defendant, dated the 2nd of December,

(1) (1904) I. L. R., 26 All., 563.

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1921, when he stated that he had no objection to the granting of a declaratory decree to the plaintiff establishing his title to the extent of one-half, but that he would contest the plaintiff's right to obtain joint possession before the partition of the joint mahal takes place. The court of first instance found that the *sir* lands in dispute had been in the defendant's possession for some 24 or 25 years and that this possession must have been with the plaintiff's consent as the plaintiff had been receiving profits from the defendant during these years. It accordingly held that it could not disturb the possession of the defendant extending over 25 years and with the plaintiff's consent. The learned District Judge also remarked that there was positive evidence of the defendant's separate possession for 24 years, and then held that it was clear to him that the defendant, whose separate possession had been legal from the outset and had not been by virtue of any illegal act of ouster, was entitled to retain his separate possession.

We, therefore, think that as in this case the defendant's possession had been exclusive and peaceful for a long number of years this is not a fit case in which his possession can be disturbed by passing a decree for joint possession in favour of the plaintiff. We accordingly dismiss the appeal.

## APPELLATE CRIMINAL.

Before Mr. Justice Mukerji and Mr. Justice King.

1928

July, 12.

EMPEROR v. COL. BHOLANATH.\*

*Indian Penal Code, section 499, exception 9—Defamation—  
“Good faith”—Proof of exact words used—Criminal  
Procedure Code, section 342—Statement of accused  
person—Conviction on such statement.*

In order to come within exception 9 to section 499 of the Indian Penal Code the imputation must have been made by the accused person in good faith for the protection of the interest of himself or any other person. It is not sufficient that the person making the imputation believed in good faith that he was acting for the protection of any such interest.

*Per MUKERJI, J.*—Although it can not be laid down as a universal proposition that in no case where the actual words used have not been proved can a conviction for defamation by word of mouth be maintained, yet in the majority of cases it should be so. The court must be put in possession of the words used and also of the context in which they were used, and not merely of the impression of the words and their context left on the minds of the witnesses, in order to find the intention and the effect of the words.

The examination of an accused person under section 342 of the Code of Criminal Procedure is not meant to supply any deficiency that may exist in the prosecution evidence. But if, on the whole of the statement of the accused person taken together, his guilt is established, there cannot be any bar to a conviction simply because the prosecution evidence, by itself, would not have secured a conviction. He has nothing to complain of if his whole statement is accepted and he is convicted on it.

*Per KING, J.*—It is unnecessary to prove the exact words used by the accused, for the purpose of supporting a conviction for oral defamation. A witness' failure to recall the exact words used or the exact context in which they were spoken is immaterial, provided that he can give a sufficiently clear account of the purport of the defamatory remarks.

\*Criminal Appeal No. 306 of 1928, from an order of P. C. Plowden, Sessions Judge of Bareilly, dated the 18th of February, 1928.

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If the prosecution evidence were discarded as worthless, there would be no necessity or justification for questioning the accused person, under section 342 of the Code of Criminal Procedure, at all and it is doubtful whether the accused person could in such a case be rightly convicted merely on his own statement.

THE facts of the case fully appear from the judgements of the Court.

Pandit *Motilal Nehru* and Mr. *Nehal Chand*, for the appellant.

Babu *Sailanath Mukerji* and Munshi *Surendra Nath Verma*, for the complainant.

The Government Pleader (Mr. *Sankar Saran*), for the Crown.

MUKERJI, J. :—The appellant, Col. Bholanath, has been convicted of the offence of defamation under section 500 of the Indian Penal Code and has been sentenced to pay a fine of Rs. 500. The prosecution was started on two complaints filed by his own daughter-in-law, Mrs. Bishesharnath, in the following circumstances. The complainant was married to one Mr. Thomson, a well-known and wealthy manufacturer of tiles etc., carrying on business at Allahabad and Cawnpore. She came to be introduced to the family of the appellant while he was stationed at Allahabad, and there she met the son of the appellant, Lt. Bishesharnath. According to the complaint, filed on the 26th of June, 1927 (the first complaint), the complainant and Bishesharnath grew to be intimate friends. Mr. Thomson removed to Cawnpore permanently, and then the complainant and Bishesharnath often met, secretly. On the death of Mr. Thomson the parties met openly, and according to the complainant herself the two began to live as husband and wife from December, 1924. Bishesharnath was posted to Quetta, and, at his request, the complainant went to live with



him there, with her illegitimate baby, of whom Bishesharnath was the father. The baby died in Quetta, and thereafter Bishesharnath was sent to Moradabad for his training, having been transferred to the Political Department. The complainant lived with Bishesharnath there and passed for a friend of Bishesharnath's mother. The Roman Catholic priest at Moradabad, to whom the complainant used to pay visits, deprecated her living with Bishesharnath without her being married to him. Bishesharnath changed his religion and adopted the Roman Catholic Christian faith. Then the two were married, secretly, at Moradabad in August, 1926. The fact of the marriage was kept secret, the reason being, according to the complainant, that it was feared that the disclosure of the fact of the marriage would affect adversely the employment of Bishesharnath in the Political Department. It is, however, a fact that according to either a will or a deed executed by the late Mr. Thomson his widow could enjoy the income of the estate, amounting to Rs. 4,000 to Rs. 6,000 a month, for her life, subject to loss of the income on remarriage. The marriage was kept secret, and the income from the estate of Mr. Thomson was enjoyed by the complainant. In December, 1926, Mr. Stewart, I.C.S., the head of the Training Institution, having come to know that Bishesharnath was living with a European lady, who was reputed not to be his wife, pressed Bishesharnath to disclose the nature of the relationship that existed between the two. In spite of further attempts at concealment, the fact of the marriage was disclosed in December, 1926. On 14th March, 1927, a telegram was received from the Government by the Training College authorities, directing the reversion of Bishesharnath to the regular Military Department. This seems to have upset him considerably. Frantic efforts were made by him to obtain intercession of friends and high officers. The appellant and

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his son were not on good terms, yet Bishesharnath and his wife went to Delhi, where Bishesharnath's father was, in order to see him. This was on or about the 19th of March, 1927. There, at Delhi, Bishesharnath obtained an interview with the Viceroy, but nothing came out of it. The couple then returned to Moradabad. On the 27th of March, 1927, Col. Bholanath arrived at Moradabad, and stopped at the dâk bungalow. The previous day he had wired to Mr. Abu Mohammad, an officer of the Provincial Service, who was then in charge of the Training Institution, Mr. Stewart having left Moradabad on leave. Mr. Abu Mohammad brought Col. Bholanath to his own house and sent for Bishesharnath. The latter and his wife both came. They had a talk with Mr. Abu Mohammad, and they left. Mr. Abu Mohammad then took the appellant to the house of Mr. Collett, the District Magistrate. Col. Bholanath had some talk with him, and then, on his way back to the house of Mr. Abu Mohammad, Col. Bholanath saw the Superintendent of Police, Mr. Field, and then left for Delhi the next day.

It is said for the prosecution that during his interview with Mr. Abu Mohammad and Mr. Collett the appellant defamed the complainant by stating that she was of unsound mind and likely to murder her husband, that she was of loose character, "man-mad," and had a very bad reputation for being immoral at Cawnpore and at Allahabad. It is on these two charges that the prosecution was based.

For the prosecution Mr. A. P. Collett and Mr. Abu Mohammad and a few more witnesses were examined, as also the complainant. The appellant made his statement before the committing Magistrate and the Sessions Judge. He examined two witnesses.

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The learned Sessions Judge found that the prosecution witnesses failed to give the exact words which, it is said, defamed the complainant. This, he thought, did not affect the prosecution adversely, because, he thought, Col. Bholanath "to all intents and purposes admitted the offences with which he had been charged". Then the learned Judge discussed the statement of the appellant and arrived at the conclusion that Col. Bholanath did make a statement as to the want of sanity of the complainant to the extent of alleging that his son's life was not safe at her hands. Then the Judge expressed his belief that the statement was made "in good faith", but not within the meaning of the definition of that expression as given in the Indian Penal Code, that he acted on the statement of his son and that he was not justified in doing so without further inquiry. The Judge accordingly convicted the appellant on the first count.

On the second count the learned Judge found that whatever might be the character of the complainant, the imputation after the marriage could serve nobody's purpose and the information given to Messrs. Collett and Abu Mohammad brought the appellant outside exception 9 of section 499 of the Indian Penal Code.

While I am not prepared to lay down, as a universal proposition, that in no case where the actual words used have not been proved a conviction for defamation by word of mouth cannot be maintained, it must be conceded that in the majority of cases it should be so. Defamation is defined as follows:—"Whoever by words . . . makes or publishes any imputation concerning any person intended to harm, or knowing or having reason to believe that such imputation will harm, the reputation . . . is said . . . to defame that person". When the question arises as to whether the words used were intended to harm or had the effect of harming the reputation, the

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court must be put in possession not only of the words used, but also of the context in which they were used, in order to find the intention and the effect of the words. If the court should accept, instead of the words and the context, the "impression" (of the words used, and of the general conversation) "left on the minds of the witnesses", it would be yielding its own duty to witnesses, with the result that the accused person will have no benefit of the opinion of the court itself. The observations of their Lordships of the Privy Council in the case of *Rainy v. Bravo* (1) are highly relevant to this case. In the case itself, a retrial was ordered on the ground that the principal witness, Metzër, attempted to state the words used in the note destroyed (containing the libel), and not merely his impression of the purport.

In this particular case, it will be remembered, the conversation between the appellant and the two witnesses took place on the 27th of March, 1927. No record of the conversation was made at the time, nay, no notes were ever made. None of the witnesses say that they made an entry of the substance of the conversation in their diary. The witnesses were examined on the 19th of July, 1927, some 4 months after the conversation. It would, therefore, be difficult for the witnesses to give any coherent and cogent narrative of the interview. Let us compare the evidence actually given by the two witnesses, whose honesty and independence is above suspicion.

Mr. Collett's statement, in his examination-in-chief, is very short. The reason evidently is that he did not remember, as he himself says, most of the conversation that passed between him and the appellant. In his examination-in-chief he said: "He (the appellant) said she (the complainant) was not in her senses or words to that

(1) (1872) L.R., 4 P. C., 287 (287 (295 et seq

effect and spoke of her as a woman of loose character." In cross-examination he said: "That was the purport of his conversation". He could not give the sequence of the conversation, what preceded and what followed these statements. After this, I may safely say that his evidence affords little assistance to the court. That Mr. Collett has a poor recollection of what passed in the interview will be clear from the following facts. Col. Bholanath's whole case is that he was anxious for the safety of his son at the hands of his wife, and that was why he sought assistance of the witnesses, Messrs. Abu Mohammad and Collett, the authorities at the place, although they were utter strangers to him. While he said that that was the object of his visit and while Mr. Abu Mohammad supports him on this point, Mr. Collett has not the slightest recollection on this important subject. He says: "I cannot say whether he (the appellant) was anxious for his son's safety". According to Mr. Abu Mohammad when the appellant saw, at the witness' request, Mr. Collett, he (the appellant) "repeated almost the same allegations against the complainant and said he was *anxious about his son's safety*." As to the complainant's moral character, Mr. Collett simply remembers that Col. Bholanath mentioned her as a woman of loose character. He, however, has a definite recollection that Col. Bholanath mentioned that his son had been living with the complainant before their marriage. The complainant, however, charges the appellant with having said something more or less definite and more serious.

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Coming to Mr. Abu Mohammad, the witness says not a word about the appellant having spoken to him about the mental condition of his daughter-in-law. On the other hand, he says that he does not remember that the appellant ever mentioned that the complainant was

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insane. As to her moral character, Mr. Abu Mohammad certainly gives his own impression of the interview and not the words used, except the word "man-mad" as having been used by the appellant. The witness does say that he understood Col. Bholanath as having said that the complainant was a bad character and that her bad character was well-known at Cawnpore and at Allahabad. We have to remember that the second complaint, which complained of the attack said to have been made on her character, was filed on the 28th of October, 1927, *after the complainant had seen Mr. Abu Mohammad at Bijnor*. It was on information supplied by the witness himself, *several months after the occurrence*, that the complaint is based. In the circumstance, it would be unsafe to base a conviction on the unaided memory of the witness.

I am of opinion that there was ample justification for the court below for discarding the prosecution evidence and for considering whether there were sufficient materials on the admission of the appellant to justify a conviction.

This brings me to a consideration of the law relating to the statement of the accused person, viz., how far it can be used against him.

It is established law that when a previous statement of a party is put into evidence against him, as an admission made by him, you must tender in evidence the whole of it, including the portion which goes in his favour. In order to understand what the person meant, you must consider the whole of that statement. This will not preclude you from finding, *on the basis of evidence on the record*, how far the statement is correct and how far it is untrue; see Phipson's Manual of Evidence, 3rd edition, p. 79. The same principle will apply where the statement is made in the course of the trial, whether it

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be a civil or criminal trial. I need hardly point out that the statement under discussion is not the same thing as a "deposition" given in the case by a party, for the purpose of furnishing evidence in it. Such being the general law, let us consider the law as laid down by the Code of Criminal Procedure as regards the statement of an accused person.

There is no provision in the Indian law by which an accused person may give his sworn testimony in support of his case. Indeed, section 342 of the Code of Criminal Procedure prohibits the swearing of an accused person. The purpose and use of the examination of the accused person is laid down in the Code of Criminal Procedure and no one has a right to travel outside it. The rule says that the accused person may be questioned, from time to time, by the court, during the progress of the inquiry or trial, for the purpose of enabling him to explain the circumstances appearing in the evidence against him. It further lays down that, *for the same purpose*, the court shall examine him after the evidence for the prosecution has been closed. It is clear that the examination of the accused person is not meant to supply any deficiency that may exist in the prosecution evidence.

As to the use of the statement, section 342 simply says that the court "may take the same into consideration". This is purposely wide. The court is invited to come to the proper conclusion by taking into consideration not only the evidence adduced for the prosecution and defence (if any) but also the statement of the accused person. If the statement of the accused person satisfactorily explains the prosecution evidence, there can be no conviction. If the statement, as also the defence evidence (if any), do not rebut the prosecution evidence and the court feels justified in acting on the latter,

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it will convict. It is clear and follows from what has gone before that, if there be no sufficient evidence for the conviction, or, if from the vagueness of the prosecution evidence, the court is not prepared to act on it, it should not be open to the court to supplement the prosecution evidence by selecting, out of the statement of the accused person, passages which might corroborate the prosecution evidence and to reject those passages which go to exonerate the accused person. Cases on the principle enunciated above are numerous and the following may be usefully read: *King-Emperor v. Bhut Nath* (1), *Re Abibulla Ravuthan* (2) and the cases cited there.

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If, on the whole of the statement of the accused person taken together, his guilt is established, and his plea, say, of acting in self-defence or of the case falling within any of the general or special exceptions is not made out on the facts admitted, there cannot be any bar to a conviction simply because the prosecution evidence, by itself, would not have secured a conviction. Let us take this example:

A is charged with murder. The prosecution evidence is vague and not conclusive. A, on being questioned, makes the following statement: "The deceased, two days before the murder, insulted me, in open market, by abusing me and by beating me with a shoe. On the day of occurrence I found him returning to his house alone and I struck him with a *lathi*, he fell from the high ground on which he stood and thereby broke his head." The medical evidence, let us suppose, points to only one *lathi* blow on the back of the deceased and is consistent with the accused's statement. Can the accused person be convicted of murder? Let us assume there is no eye-witness worthy of belief and the court is bound to disbelieve the witnesses. I suppose it would be impossible to convict A of murder. But A may surely

(1) (1902) 7 C. W. N., 345.

(2) (1915) I. L. R., 39 Mad., 779.



be held guilty of causing simple hurt, on his own statement. He has nothing to complain of if his whole statement be accepted and he is convicted on it. He need not have made a statement, but having made one, he may be held guilty, on it.

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In this view of the law, I proceed to examine the statement of the appellant. The appellant was examined by the committing Magistrate on the 22nd of December, 1927. He was again examined before the court of session. On the 22nd of December, 1927, the appellant stated that he never described the complainant as a woman of unsound or unbalanced mind, that he did say that his son's life was in danger at her hands, and that he criticised the moral character of the complainant adversely, but only in so far as it affected him and his family. He denied that he used the word "man-mad".

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So far as the complaint is that the appellant stated that the complainant was insane, fit for a lunatic asylum, we have already shown that the exact words used are not known. Mr. Collett gives only his "impression", and Mr. Abu Mohammad does not remember anything like that as having been mentioned before him. The appellant denies that he ever made any such statement. In the circumstances there can be no conviction for defamation on the ground that the appellant called the complainant a woman of unsound mind, etc.

The second imputation, which is really connected with the earlier charge of having called the complainant of unsound mind, is that the life of her husband was not safe in the hands of the complainant, and that she was likely to murder her husband. For this, there is ample reason to suppose that the appellant believed in good faith that such was the case. In bringing this matter before the two witnesses, Messrs. Abu Mohammad and Collett, the appellant acted in the protection



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of his son's interest, and therefore did not commit the offence of defamation.

The complainant would make us believe that before the telegram arrived on the 14th of March, 1927, reverting her husband to the military career, and before she and her husband went to Delhi on the 19th or 20th of March, she and her husband were on the best of terms. This is not true. [The judgement then referred to certain evidence and continued.] There cannot be any manner of doubt that about the 19th of March, 1927, the couple were living a very unhappy life and Bishesharnath did tell his father that he apprehended danger to his life.

The learned Sessions Judge thinks that Col. Bholanath should not have believed Bishesharnath, for he was an undutiful son. Bishesharnath fell into the bad graces of his father owing to his intimacy with the complainant, and, if it was against *her* that he was then complaining, there would be every reason for Col. Bholanath to accept his son's story as true. We have already shown that Bishesharnath's story about the unhappy life was, as a matter of fact, true. Thereafter, the appellant learnt from his bearer that, while at Delhi, the complainant had tried to purchase a revolver. This fact is now admitted, and the explanation of the complainant that the husband wanted the revolver is untrustworthy. Col. Bholanath says that his wife was entirely upset, and this fact is amply proved by the incident that Col. Bholanath made an inquiry and found that the story of the attempt at purchase of a revolver was true. He made a report to the police-station. The report is on the record and is Ex. F. It was made on the 22nd of March, 1927. In it, Col. Bholanath stated that the complainant, on account of her bad temper, had several times threatened to kill his son. The man who took

down the report states, in *cross-examination*, that the appellant was at the time of making the report "much disturbed". Thereafter Col. Bholanath saw Mr. Stewart, who was then at Delhi, on his way home. Mr. Stewart told him that he did not see his son when leaving Moradabad. He (Mr. Stewart) then wired to Moradabad inquiring if Bishesharnath was there. No reply having been received from Moradabad, Col. Bholanath wired to Mr. Abu Mohammad that he was leaving for Moradabad. All this is ample evidence of honest behaviour and good faith on the part of Col. Bholanath. No further inquiry was needed; see *Abdul Hakim v. Tej Chandar* (1).

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Col. Bholanath's anxiety was only to take away his son from his wife and to place him out of danger. If this was so he was bound to tell Mr. Abu Mohammad, the head of the institution in which the son was being trained, and to tell the District Magistrate all his fears and to seek his and Mr. Abu Mohammad's aid. At about the end of his cross-examination Mr. Collett realized and admitted that the visit of the appellant to him could have been only as a District Magistrate, and not as a mere third party. Col. Bholanath's visit to the Superintendent of Police points to the same conclusion. The imputation complained of, namely the life of Bishesharnath was not safe in the hands of his wife, was in the circumstances amply protected by exception 9 to section 499 of the Indian Penal Code.

Next comes what is, virtually, the second charge. The complaint is that the appellant told the witnesses, Messrs. Collett and Abu Mohammad, that the complainant was of loose character, "man-mad" and had a very bad reputation for being immoral at Cawnpore and at Allahabad. Col. Bholanath states: "I criticized the complainant's character so far as such character affected

(1) (1881) I. L. R., 3 All., 815.

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me adversely as a father-in-law. What I said was that we were Rajputs, whose chief pride was that we never mixed our blood. That I belonged to the old school and that I did not approve of mixed marriages, that the complainant was older than my son, that she had been married twice before and had, too, lots of children, the eldest of whom was older than my boy, that she had lived in adultery with my son during the life-time of her second husband, the late Mr. Thomson, and in open immorality at Allahabad, Cawnpore and Quetta with my son; that a woman of that character cannot be tolerated in a Rajput and Hindu family as a daughter-in-law. I made these remarks as this affected me adversely as a father-in-law, and as far as it affected my son and my family generally." This statement, there can be no doubt, is a clear and honest statement of what was actually said by the appellant to the witnesses Messrs. Abu Mohammad and Collett. This speaks before the court a good deal more than the witnesses could possibly do from their memory. Undoubtedly, the statement made by Col. Bholanath to the witnesses was a defamatory statement and came within the purview of section 499 of the Indian Penal Code.

If the case came within any of the exceptions of section 499 of the Indian Penal Code, it would be for the appellant to show that it did so. No doubt, if the evidence for the prosecution afforded any assistance to the appellant in proving that he came within one of the exceptions to section 499, he was welcome to take advantage of any such evidence. There is, however, not much to be found in the prosecution evidence which can be of assistance to the appellant.

It was argued on behalf of the appellant by Pandit Moti Lal Nehru that the statement came within the exception 9 to section 499 of the Indian Penal Code and he

asked us to read the exception as bearing the following meaning. An imputation which would be otherwise defamatory would not be defamation if it was made in good faith, and the person making the imputation believed that he was making it for the protection of his own interest or the interest of any other person. He referred to section 79 of the Indian Penal Code as supporting his argument. I have considered the point carefully, and I am of opinion that the contention is not sound.

The expression "good faith" is defined in section 52 of the Indian Penal Code as follows:—"Nothing is said to be done or believed in good faith which is done or believed without due care and attention." It will be noticed that the expression "good faith" can be used both in connection with something done and in connection with something believed. For example in section 300, exception 3, the expression "good faith" has been used in connection with a belief. The expression is found, in exception 9, in connection with an act. Further, the expression "good faith" has been used only once. I can, therefore, read the 9th exception as meaning only this, that a man who makes an imputation in good faith and makes that imputation for the protection of the interest of himself or any other person is outside the operation of section 499 of the Indian Penal Code. There is no justification, in my opinion, for reading the exception as meaning that if the person making the imputation *believes* in good faith that he has been acting for the protection of the interest of himself or any other person he is not liable. It will be a question of law, and not of fact, for decision in a particular case by the court as to whether the man making the imputation in good faith was or was not acting for the protection of the interest of himself or any other person. This view in

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no way militates against the view taken in the case in I. L. R., 3 All., 815, cited above.

That being my reading of the law, the question is whether Col. Bholanath had any interest of himself or of his son to protect in making the imputation against the complainant. It will be noticed that Col. Bholanath himself gives no explanation as to the circumstances in which he made the imputation quoted above. In the statement of Mr. Abu Mohammad we have got a single sentence, which might or might not furnish us with a clue as to what led Col. Bholanath to make the imputation. Mr. Abu Mohammad says: "It was to justify this refusal that he attacked her character". The refusal referred to was as to Mrs. Bishesharnath being received by the appellant as his daughter-in-law. It may be that there was some suggestion on behalf of the witnesses, Messrs. Collett and Abu Mohammad, or of one of them that the appellant should accept the complainant as his daughter-in-law, the marriage being a *hard* fact. Or it may be that Col. Bholanath, in stating how he was afraid of the complainant's possible violence towards her husband, could not restrain himself and came out with a story as to the complainant's past life. If we take the most charitable view of the appellant's case (as to which, however, there is no evidence) the appellant gave out the past history or supposed past history of the complainant's life to satisfy what must be taken as idle curiosities of the witnesses, Messrs. Collett and Abu Mohammad. It was enough to tell those gentlemen that the appellant's son's life was in danger at the complainant's hands. The alleged past history of the complainant's life could not, in any way, justify a conclusion that she was of a violent temperament and it was unsafe for Bishesharnath to live with her. As it turns out, the imputation made by the appellant served nobody's purpose and

the appellant is not entitled to come within the exception 9 of section 499 of the Indian Penal Code.

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The result of my deliberations, therefore, is that while the first charge cannot be sustained, the second charge cannot be refuted.

*Mukerji, J.*

Like the learned Sessions Judge who tried the case I have every sympathy for Col. Bholanath in his distress, but I have to administer the law, and he has certainly been found having done something which the law did not permit him to do.

For the appellant, his counsel has not urged anything about the sentence. The reason is perfectly clear. The appellant cares little for the amount of fine inflicted on him. What he cares for is a conviction. Having regard, however, to the circumstances of the case, and to the fact that on one of the two counts the appellant has been acquitted, I think it right and proper, though unasked, to reduce the sentence to the sum of Rs. 250.

KING, J. :—I concur in the proposed order, which is the outcome of our previous consultations, but consider it desirable to state my reasons independently.

The accused is charged with having made certain defamatory statements to Mr. Collett, the District Magistrate and to Khan Bahadur Syed Abu Mohammad, Deputy Collector, on the 27th of March, 1927. It is convenient to split up the charge into two separate parts or charges.

The first charge is that the accused stated that the complainant was of unsound mind and likely to murder her husband. If the accused spoke of the complainant as a lunatic with homicidal tendencies, his remarks were obviously highly defamatory.

There is no evidence that the accused described the complainant as positively insane in the sense of being

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a fit subject for detention in a lunatic asylum. The accused never suggested that any action should be taken against her under the Indian Lunacy Act. Mr. Collett deposes briefly, without any amplification or explanatory details, that the accused stated that the lady was "not in her senses". The accused admits making this statement and explains that in referring to the lady's eccentric conduct in jumping into a river, and trying to buy a revolver, and so forth, he stated that this was not the conduct of a woman in her senses. I am prepared to accept this explanation, as Syed Abu Mohammad, who was present at the interview, deposes that he has no recollection of any allegation of insanity against the lady. Evidently the accused made no imputation of insanity in sufficiently definite terms to justify a conviction for defamation on that ground alone. He did, however, mention that the lady had on certain occasions behaved like a person out of her senses, so much so that he feared that his son's life was in danger at her hands.

I may here remark that in my opinion it is unnecessary to prove the exact words used by the accused, for the purpose of supporting a conviction for oral defamation. It is sufficient to prove the purport or substance of the defamatory imputations. No honest witness would profess to remember the exact words used by a person who has been speaking for even 15 minutes. At the most he may remember some striking phrase or expression. But a witness' failure to recall the exact words used or the exact context in which they were spoken is immaterial, provided that he can give a sufficiently clear account of the purport of the defamatory remarks. Although the learned counsel for the appellant argued that no conviction could be sustained unless the exact words were proved, he was unable to quote any authority for his proposition, and I am not prepared to accept it. English rulings on the English law of libel



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seem beside the point when the task before us is to apply the provisions of section 499 of the Indian Penal Code to a case of alleged defamation by spoken words.

The next question is whether the accused represented that the lady was likely to murder her husband. [The judgement referred to certain evidence and proceeded:—] The accused frankly admits, "I did say to Mr. Collett that my son's life was in danger at the complainant's hands". "The reason I went to Mr. Collett was that I feared for my son's safety, and I must have made some statement of that kind, though I do not remember the exact words."

*King, J.*

The accused explains that he had good reason to fear for his son's safety. His son saw him at Delhi on the 20th of March, 1927, and stated that he and the complainant had been leading a "cat and dog life" for some time, and he was always in fear of some sort of violence at her hands. He mentioned that the lady had tried to throw herself into a river at Moradabad. He also mentioned that she had roused his suspicions by getting possession of a razor. After hearing all this, the accused got information that the complainant had tried to buy a revolver from Manton's at Delhi. He verified this fact by personal inquiry at Manton's establishment. Then for the first time he became seriously alarmed. He made a report at the police-station on the 22nd of March that the complainant had several times threatened to kill his son, and that she had tried to buy a revolver from Manton's. His son and the complainant had meanwhile returned to Moradabad, but the accused failed to get any news of his son for several days. Even a reply-paid telegram failed to bring an answer. The accused and his wife were by this time in a state of frantic anxiety about their son's safety, and on the 26th of March the accused went to Moradabad, and on the

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following day he poured forth his worries and apprehensions firstly to the Khan Bahadur and then to Mr. Collett, the District Magistrate.

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I believe this explanation to be substantially correct. Bishesharnath made similar statements about his wife's eccentric and suspicious behaviour, and about his fears for his own safety, both to Mr. Collett and to the Khan Bahadur. It is certain that the accused was genuinely anxious for his son's safety and that was the reason why he approached the District Magistrate. The learned Sessions Judge also accepts this view but holds that the accused did not make the imputations against the complainant "in good faith" (in the technical sense of those words), because he should not have acted upon information given by his son without verification.

I think this is putting an unreasonably strict interpretation upon the requirements of "good faith". Bishesharnath had no doubt tried to conceal his immoral connection and subsequent marriage with the complainant from his father. He is no George Washington, but after all he is a commissioned officer, and I do not understand why his father should be expected to disbelieve every word he says. Evidently he had convinced his father that his life was in some danger. But it was the complainant's attempted purchase of the revolver that brought things to a climax. The accused verified this fact for himself and took it as a striking confirmation of his darkest suspicions. In all the circumstances was his belief unreasonable? I am not at all satisfied with the complainant's explanation of the revolver incident. When an officer wants a service revolver he would not usually ask his wife, who is utterly ignorant of fire-arms, to write and order it. Without Bishesharnath's evidence this point cannot be cleared up, but I am doubtful whether the complainant did not try to get a revolver on

her own account. The complainant is shown to be liable to outbursts of hysterical excitement. Mr. Beatty speaks of seeing her in a state of great excitement and talking incoherently, and the Khan Bahadur describes her as "not of unsound mind but excitable". She had a miscarriage in March, 1927, which may have affected her mental condition at about that time. The morbid sentimentality which she displayed with regard to this miscarriage suggests a temporary loss of mental balance. If a woman in that state of mind tries to get possession of a revolver one might reasonably fear that she is contemplating some desperate act of violence.

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The mere fact that the accused interviewed the head of the training school, and the District Magistrate, and the Superintendent of Police at Moradabad raises an inference of his sincerity and his genuine fear for his son's safety. He undoubtedly made the imputation, which we are now considering, for the protection of his interests and his son's interests.

If one puts a very strict construction upon "good faith", one might well hold that father Jucundus and Mr. Beatty were also guilty of defamation. Father Jucundus had been present at some quarrel between Bishesharnath and his wife and was so frightened that he rushed to implore Mr. Beatty's help, representing that Bishesharnath's murder at his wife's hands was imminent. Mr. Beatty went and told Mr. Collett as District Magistrate that the complainant was reported to be likely to murder her husband. No one doubts that father Jucundus and Mr. Beatty acted honestly and for the sole purpose of averting an anticipated murder. But did they act "with due care and attention?" Did not Father Jucundus at least act somewhat precipitately? One must not exact a standard of caution and attention

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higher than could be reasonably expected of an average person placed in the same situation.

Having regard to all the facts of this case I hold that the accused did state that the complainant was likely to murder her husband, or words to that effect, but the accused is entitled to the protection of the 9th exception of section 499.

Lastly we have to consider the second charge, namely the imputation that the complainant was of loose character, "man-mad", and had a very bad reputation for being immoral at Cawnpore and Allahabad.

Mr. Collett says the accused spoke of the lady as a woman of loose character and mentioned that his son had been living with her before their marriage. The Khan Bahadur deposes that the accused spoke of her as a woman of very bad character and stated that she was well-known for her bad reputation in Cawnpore and Allahabad. The accused certainly called her "man-mad". I take this expression as a popular rendering of the technical term nymphomaniac.

The accused admits stating that the lady had lived in adultery with his son during the lifetime of her second husband, and in open immorality with him at Allahabad, Cawnpore and Quetta. He does not admit that he called her "man-mad" or that he charged her with immoral conduct with other men.

I have no hesitation in accepting the Khan Bahadur's evidence that the accused used the expression "man-mad". It is a very unusual expression, and that is probably the reason why the witness remembered it.

The charge is, therefore, proved and partly admitted. There is no clear proof that the accused spoke of the complainant's misconduct with men other than Bishesharnath. So we must take it that he referred only to her ante-nuptial misconduct with his son, although

the expression "man-mad" would seem to have a wider significance, and the defence made an ill-advised attempt to prove the complainant's misconduct with other men.

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King, J.

The complainant denies adultery with Bishesharnath during Mr. Thomson's lifetime, although they were admittedly intimate friends and she admittedly behaved in a manner likely to rouse suspicion. Soon after Mr. Thomson's death in 1924 the couple admittedly lived as husband and wife, and she bore at least one illegitimate child to him although they were not married until August, 1926. When the complainant behaved in this way I do not think she had much cause for complaint if her father-in-law told the District Magistrate the truth about her, i.e. that she was guilty of ante-nuptial misconduct with her husband. Although the statement is defamatory, its publication would, at the most, amount only to a very petty offence. The expression "man-mad", however, is highly defamatory, and this greatly aggravates the offence.

I agree with my learned brother that the accused cannot claim the benefit of the 9th exception with reference to this charge. The accused, when speaking to the District Magistrate, had no justification for charging the complainant with sexual immorality. The District Magistrate could only take action for the purpose of averting an apprehended murder or suicide. For that purpose he might use his influence to effect a temporary separation between husband and wife. From the District Magistrate's point of view it was quite irrelevant whether the complainant was sexually moral or immoral. The imputation of immorality cannot be held to have been made for the protection of any one's interest. The conviction on the second charge must, therefore, be upheld. I agree that a fine of Rs. 250 will meet the case.

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Although my learned brother and I have arrived at the same conclusion, we have done so on somewhat different grounds, and for that reason I have thought it necessary to write a separate judgement.

King, J.

He holds that "there was ample justification for the court below for discarding the prosecution evidence and for considering whether there were sufficient materials on the admission of the appellant to justify a conviction." I must respectfully dissent from this view, since in my opinion the prosecution evidence established a *prima facie* case on both charges.

If the prosecution evidence is to be discarded, as not making out even a *prima facie* case, then I am doubtful whether the appellant could be rightly convicted merely on his own admissions, as my learned brother seems to have done. He laid emphasis on the well-known statutory provision that an accused person should only be questioned for the purpose of enabling him to explain any circumstances appearing in the evidence against him. But if the prosecution evidence is discarded as worthless, then there was no justification for questioning him at all. There was nothing calling for an explanation. I quite agree that "the examination of an accused person is not meant to supply any deficiency that may exist in the prosecution evidence." Bearing this in mind, I have not been able to follow the line of reasoning adopted by my learned brother in finding both charges proved, merely on the strength of admissions elicited by questions which, *ex hypothesi*, should never have been put to the accused. The ruling in *Re Abibulla Ravuthan* (1), which he has cited, seems to be an authority for holding that a conviction based on such grounds would not be justified. Nevertheless he agrees in acquitting on the first charge, not because

(1) (1915) I. L. R., 39 Mad., 770.

the defamatory statements are not proved, but because they are covered by the 9th exception. He agrees in convicting on the second charge because the defamatory statements are proved and are not covered by the 9th exception. I may remark that I accept his interpretation of that exception.

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King, J.

The appellant's case was argued before us for about two days by a most able and eminent counsel, yet he made no suggestion that any questions had been improperly put to the accused on the ground that there was no *prima facie* case for him to answer. In my opinion there would have been no justification for making such a suggestion.

Regarding the use which is to be made of the statement of an accused person in court, I think it is difficult to make any useful general observations. Due consideration must of course be given to every part of the statement, but the court must exercise its judgement and common sense in accepting or rejecting any part of the statement as true or untrue.

BY THE COURT.—We accept the appeal in part, and acquit the appellant of the first portion of the charge which related to the imputation that the complainant was of unsound mind and likely to murder her husband. We affirm the conviction as to the latter portion of the charge which related to the imputation of immorality of the complainant. We reduce the sentence to a fine of Rs. 250. The balance of the fine will be refunded (if already paid) to the appellant.

## REVISIONAL CIVIL.

*Before Mr. Justice Dalal.*1928  
*July, 17.*EMPEROR THROUGH DISTRICT MAGISTRATE OF  
ETAWAH (APPLICANT) *v.* BIHARI LAL (OPPOSITE  
PARTY).\**Civil Procedure Code, section 115—Revision—Practice—  
Where other remedy available—Criminal Procedure Code,  
section 476—Costs.*

There is no invariable rule of the High Court under which an application for revision under section 115 of the Code of Civil Procedure should be refused where any other remedy is open, excepting, of course, in cases where an appeal lies to the High Court.

A civil court taking proceedings under section 476 of the Code of Criminal Procedure would have jurisdiction to award costs to one or the other party in a case where the parties to such proceedings are the same as those in the civil litigation. It has no jurisdiction to award costs of such proceedings against a District Magistrate on whose application, drawing the attention of the court to the production of a seemingly forged document in a suit in that court, the proceedings were started, but who was not a party to the suit itself.

*Ganga Charan v. Baddel* (1) and *Debi Das v. Ejaz Husain* (2), referred to.

THE facts of the case fully appear from the judgment of the Court.

The Government Advocate (Pandit *Uma Shankar Bajpai*), for the applicant.

*Munshi Baleshwari Prasad*, for the opposite party.

DALAL, J. :—One *Bihari Lal* sued *Dwarka Prasad* in the Munsif's court at Etawah by suit No. 478 of 1925. The dispute was about some land within the Municipality, and the defendant filed a plan of the

\*Civil Revision No. 154 of 1928.

(1) (1913) 19 Indian Cases, 736. (2) (1905) I. L. R., 28 All., 72.



Municipality of date 1922, showing that his brother Thakur Das was in possession of a certain plot of land. The plaintiff Bihari Lal filed another copy in which the words added were that it was land of Musammat Gobindi. The suit was dismissed in default of parties. The District Magistrate naturally held an inquiry on hearing that two different copies of the same document were given to two parties by the Municipality. He came to the conclusion that the copy filed by Bihari Lal was a forgery. He thereupon drew the attention of the Government, who directed him to inform the court concerned of his suspicion. He did so by a petition, dated the 14th of July, 1927, in which he narrated the facts and informed the court that the Local Government had directed him to draw the attention of the original civil court to the suspicion of forgery. I think that the Collector and District Magistrate would have been better advised if he had written an official letter instead of putting in a stamped application. Possibly he was badly advised by the local Crown Officers of law. The District Magistrate was no party to the suit, and drew the attention of the court as he had reason to suspect that a crime had been committed. The Munsif held an inquiry and wrote a judgement in which he has not the courage to record any conviction as to whether the document was really a forgery or not. He ends up in doubt and therefore refuses to order prosecution. He dismissed the application of the District Magistrate and awarded costs against the District Magistrate.

The District Magistrate has come here in revision. It may be noted that in the decree the costs are awarded against the King-Emperor through the District Magistrate of Etawah and not against the District Magistrate by name.

The first question raised on behalf of the respondent was that no application in revision would lie. This

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objection is not warranted by the words of section 115 of the Code of Civil Procedure, which are :—"The High Court may call for the record of any case which has been decided by any court subordinate to such High Court in which no appeal lies thereto." An application in revision is barred only in those cases in which an appeal lies to this Court. In the present case an appeal lay to the court of the Subordinate Judge or District Judge. It was argued that there has been a practice in this Court not to permit revision when any other remedy is opened to the applicant in revision. A single Judge case, *Ganga Charan v. Baddel* (1) was quoted. No reasons are given by the learned Judge for his opinion. As regards long standing practice there is a judgement of another single Judge in *Debi Das v. Ejaz Husain* (2), in which it was held that the High Court is competent to call for the record of a civil case and pass such orders as it thinks fit, and the exercise of its powers of revision on the civil side will not invariably be confined to matters in respect of which no other remedy is open to the party aggrieved. The learned Judge observed in this matter : "It is next urged that this Court cannot interfere, inasmuch as there is another remedy which the opposite party can avail themselves of. . . . Ordinarily, I am prepared to subscribe to that, but in this matter each case must be judged upon the circumstances peculiar to it." There is no invariable rule of this Court under which an application for revision would be refused where any other remedy is open. Of course, as I have already observed, the provisions of the law are to be followed, and in cases where an appeal lies to this Court a revision would not lie.

The next question is whether the court had jurisdiction to award costs against the King-Emperor acting through the District Magistrate \* \* \* In my opinion

(1) (1913) 19 Indian Cases, 736.

(2) (1905) I. L. R., 28 All., 72.

the Munsif had no jurisdiction. The Government was not a party to the litigation, and was not acting in any personal capacity. If the court did not desire, it was not bound to hold any inquiry. It was for the benefit of the Court itself, where no forged documents should be presented, that an inquiry was rendered necessary. It is true that in proceedings under section 476 of the Code of Criminal Procedure where the Munsif takes action he acts as a civil court. At the same time there is no provision in chapter XXXV of the Code of Criminal Procedure as to the grant of costs to any party. Under these circumstances the civil court would have jurisdiction to award costs to one or the other party in a case where the parties were the same as those in the civil litigation. In the present case, as already pointed out, neither the King-Emperor nor the District Magistrate by himself was a party in the civil litigation, and therefore the Munsif had no jurisdiction to award costs in the proceedings under section 476.

In the result I set aside the order of the Munsif as regards costs in his order dated the 5th of March, 1928. I make no order as to costs here.

#### APPELLATE CIVIL.

*Before Mr. Justice Sulaiman, Acting Chief Justice, and Mr. Justice Kendall.*

BAIKUNTH NATH AND OTHERS (PLAINTIFFS) *v.* JAI KISHUN (DEFENDANT).\*

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July, 19.

*Hindu law—Hindu widow purchasing property—Accretion to husband's estate or stridhan—Burden of proof—Presumption.*

There is no presumption in law that the money with which a Hindu widow in possession of her husband's estate makes a purchase of property came out of the savings from her husband's estate. The burden is on the reversioner who, after the death of the widow, claims to recover such property

\*First Appeal No. 524 of 1924, from a decree of Man Mohan Sanyal, Subordinate Judge of Benares, dated the 4th of September, 1924.

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 BAIKUNTH NATH v. JAI KISHUN. from the person in possession to establish that the property was acquired out of such savings. *Dakhina Kali Debi v. Jagadishwar Bhattacharjee* (1) and *Diwan Ran Bijai Bahadur Singh v. Indarpal Singh* (2), referred to.

THE facts material for the purpose of this report were briefly as follows:—On the death of Ganga Dhar his widow, Musammat Mungi Bahu, succeeded to his estate. In 1885 she sold a house of her husband and realized Rs. 2,000. In 1903 she purchased a house for Rs. 600. After her death the plaintiffs, as reversionary heirs of Ganga Dhar, sued for recovery of possession of this house (among other properties) from the defendant, who was the brother's son of Musammat Mungi Bahu. No evidence was given on either side to show the source from which the Rs. 600, price of the house, came.

Dr. Kailas Nath Katju and Pandit Ambika Prasad Panday, for the appellants.

Babu Peary Lal Banerji, Munshi Gadadhar Prasad and Shah Zamir Alam, for the respondent.

SULAIMAN, A.C.J., and KENDALL, J.:—[After dealing with other points the judgement continued.]

The next question that remains is whether the house in Mohalla Bhairon Baoli, which was purchased by Mungi Bahu, can be claimed by the plaintiffs. The house was purchased under a sale-deed, dated the 4th of July, 1903, for a sum of Rs. 600. This sum consisted of Rs. 500 advanced by her previously, and a sum of Rs. 100 paid at the time. There is absolutely no evidence on either side to show where she had got the money which she advanced as a loan in the first instance, and where she got Rs. 100 from. The learned Subordinate Judge remarks that in the year 1885 she had sold a house of her husband for Rs. 2,000. The house in dispute was purchased 18 years after 1885, nevertheless the learned Subordinate Judge has said: "It is difficult to trace the source of the money out of which the house in dispute was purchased, but one thing is clear, viz., that she had Rs. 2,000

(1) (1897) 2 C. W. N., 197.

(2) (1899) I. L. R., 26 Cal., 871.

in hand out of her husband's estate, and she could therefore very well manage to save Rs. 600 out of that to purchase the house in dispute even after a lapse of 18 years."

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BAIKUNTH  
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v.  
KISHUN.

We find it very difficult to assume that Rs. 600 remained in the hands of the lady after the lapse of 18 years, and that it was with that amount that she must have purchased this house. This circumstances must accordingly be ignored. There is, therefore, no evidence either way. The learned Subordinate Judge has held that it was for the defendant to prove that the money did not come out of the income of the husband's estate. No authority has been cited before us in support of the contention that there is any presumption that the money in the hands of the lady is presumed to come out of the savings of her husband's estate. Cases have been cited which show that where it is known that property was purchased out of the savings, it would be treated as accretion to the estate if it had not been disposed of before the widow died. Those cases are distinguishable. The only case which is at all applicable is the case of *Dakhina Kali Debi v. Jagadishwar Bhattacharjee* (1), and that is in favour of the defendant and shows that there is no such presumption in law. The case of *Diwan Ran Bijai Bahadur Singh v. Indarpal Singh* (2) also suggests that there is not any general presumption that the widow can own no property herself. We accordingly think that in the absence of any evidence to show the contrary, it must be held that the plaintiffs have failed to establish that the said house was acquired out of the savings of the widow's estate. Their claim as regards this house should accordingly be dismissed.

[The judgement then proceeded to deal with other matters not relevant to this report.]

(1) (1897) 2 C. W. N., 197.

(2) (1899) I. L. R., 26 Cal., 871.

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July, 20.

## REVISIONAL CIVIL.

Before Mr. Justice Mukerji.

KARIMULLAH (APPLICANT) *v.* RAMESHWAR PRASAD (OPPOSITE PARTY).\*

*Act No. XII of 1887 (Bengal, N.-W. P. and Assam Civil Courts Act), section 22—Transfer of appeal—Jurisdiction—Criminal Procedure Code, section 476—Munsif's order in proceedings under section 476—Appeal transferred to Subordinate Judge.*

A District Judge is competent, under section 22 of the Bengal, N.-W. P. and Assam Civil Courts Act, to transfer to a Subordinate Judge an appeal from an order passed by a Munsif in proceedings under section 476 of the Code of Criminal Procedure.

THE facts of the case are fully set forth in the judgment of the Court.

Mr. A. M. Khwaja and Munshi Har Krishna Sahai, for the applicant.

Maulvi Iqbal Ahmad and Munshi Shambhu Nath Seth, for the opposite party.

MUKERJI, J. :—The only point urged in this application is whether the court below had jurisdiction to hear the appeal.

It appears that the opposite party, Rameshwar Prasad, brought a suit on a bond for the recovery of a certain amount of money against Karimullah and others. Karimullah is the applicant in this Court. It was found that Karimullah had paid up a good deal of the amount claimed and the claim of Rameshwar Prasad was excessive. At the instance of Karimullah, the Munsif directed the prosecution of Rameshwar under section 476 of the Code of Criminal Procedure, it being held by him that Rameshwar was, *prima facie*, guilty of the offences under

\*Civil Revision No. 107 of 1928.

sections 209 and 210 of the Indian Penal Code. Rameshwar filed an appeal to the District Judge and the District Judge transferred the appeal to a Subordinate Judge. The Subordinate Judge heard the case and held that the Munsif's order directing the prosecution was not justified. He ordered the revocation of the complaint.

Mr. *Khawaja* has argued that the District Judge had no jurisdiction to transfer the case to the Subordinate Judge and he has cited two Calcutta cases.

So far as this case is concerned, it is firmly established now that a court exercising jurisdiction under section 476 of the Code of Criminal Procedure does not cease to be a civil court. The proceedings taken by the court are of a civil nature, although not covered by the Code of Civil Procedure. It has, therefore, been held that a revision can lie only under section 115 of the Code of Civil Procedure, and section 439 of the Code of Criminal Procedure has no application.

An appeal is provided by the Criminal Procedure Code, section 476B, against an order passed under section 476 of the same Code. Such an appeal would be an appeal from an "order" of the court. In this case, the appeal was against the "order" of the Munsif. A District Judge is authorized, under section 22 of the Bengal, N.-W. P. and Assam Civil Courts Act, to transfer an appeal from an "order" of a Munsif to the court of a Subordinate Judge. It would follow, therefore, that it was competent for the District Judge to transfer the present appeal to the court of the Subordinate Judge. The principle that the District Judge could transfer such cases to another officer of competent jurisdiction was established by previous cases in this Court. The latest one is *Narain Das v. Emperor* (1). That was, however, a case in which a District Judge had transferred an appeal to an Additional District Judge. But the

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(1) (1927) I. L. R., 49 All., 792.

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transfer was justified under section 8 of Bengal, N.-W. P. and Assam Civil Courts Act. The same principle applies when the transfer is made under section 22 to the court of a Subordinate Judge, the appeal being from an order of the Munsif.

I hold that the Subordinate Judge had jurisdiction to hear the appeal. This application, therefore, is without merits and fails and is hereby dismissed with costs.

### APPELLATE CIVIL.

1928

July, 24.

Before Mr. Justice Sulaiman, Acting Chief Justice, and  
Mr. Justice King.

RAM KISHUN (PLAINTIFF) v. LALTA SINGH AND OTHERS  
(DEFENDANTS).\*

*Civil Procedure Code, sections 47, 145; order XXI, rules 90, 92(3)—Surety for performance of order of Court—"Party to suit"—Objections by surety to attachment and sale of his property—Confirmation of sale—Suit by surety directed against the sale, not maintainable—Res judicata in respect of execution proceedings.*

A surety for the performance of an order passed in execution proceedings executed a security bond hypothecating certain property and also personally binding himself in case the property proved insufficient. Enforcement of the surety's liability was at first attempted as against the hypothecated property, but for certain reasons it was given up and the court ordered enforcement against the person and other property of the surety. Accordingly a house belonging to him was attached and sold. After the sale he made an application purporting to be under order XXI, rule 90, of the Code of Civil Procedure, and another under section 47, both being on the ground that the house could not be sold unless and until the hypothecated property was sold first. Then he filed a suit for a declaration to the same effect and withdrew his applications, which were

\*First Appeal No. 188 of 1925, from a decree of Kashi Nath, Additional Subordinate Judge of Cawnpore, dated the 23rd of March, 1925.



accordingly dismissed and the sale confirmed. On the question whether the suit was maintainable, *held* :—

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(1) Section 47 of the Code of Civil Procedure does not bar the suit because that section does not in terms apply to a surety, inasmuch as he is not a party to the suit. The effect of section 145 is that for purposes of appeal only he is deemed to be a party to the suit, and not that section 47 as a whole is applicable to him.

(2) When an order for execution is made against a surety under section 145, his position becomes that of a judgment-debtor. The proceedings taken against him are in the nature of execution proceedings and it is implied that he may make any objections which a judgment-debtor might make, though the mode in which they are to be made has not been expressly provided. If he raises objections to the sale and the objections are dismissed and the sale confirmed, he is bound by the orders passed against him and is not entitled to re-agitate the same questions by means of a separate suit. Such a suit is barred by the principle of *res judicata* and also by order XXI, rule 92(3).

(3) A suit for setting aside a sale may lie, even after confirmation of the sale, if the decree itself be attacked on the ground of want of jurisdiction or fraud. But where the ground of attack amounts only to an irregularity of procedure in execution, and not to want of jurisdiction, such a suit does not lie.

THE facts of the case are fully set forth in the judgments of the Court.

Maulvi *Iqbal Ahmad*, Mr. *B. Malik* and Babu *R. C. Ghatak*, for the appellant.

Dr. *K. N. Katju*, Munshi *Shambhu Nath Seth* and Munshi *Jagdish Behari Lal*, for the respondents.

SULAIMAN, A.C.J. :—This is a plaintiff's appeal arising out of a suit for a declaration that a certain house is not liable to be attached and sold in certain execution proceedings, and for a perpetual injunction restraining the principal defendants from taking any such proceedings.



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*Sulaiman,*  
A. C. J

It appears that one Murtaza Khan obtained a decree for sale against Bandhan. In execution of the decree the mortgaged property was sold and purchased by Lalta Singh, defendant No. 1. This defendant deposited the money in court and Murtaza Khan withdrew the amount. Subsequently a minor, Ram Prasad, brought a suit for setting aside the sale, and got it held that the property did not belong to Bandhan. That judgement was affirmed on appeal. The property having gone out of the auction purchaser's possession, he applied for a refund of the amount of the purchase money. Murtaza Khan filed some objections but they were disallowed and he was ordered to repay it. While a revision on behalf of Murtaza Khan was pending, he obtained a postponement of the execution on the present plaintiff Ram Kishun standing as surety for the payment of the amount. Ram Kishun filed an unregistered security bond purporting to hypothecate another house. The deed further contained a covenant: "If the entire decree money cannot be recovered from the said property, I and my lawful representatives shall be liable for payment of the amount due." The revision was ultimately dismissed. Lalta Singh first tried to get the house, included in the security bond, sold. A warrant of attachment was issued but the amin reported that the boundaries did not tally, and that the person in actual occupation of the house claimed that it did not belong to Ram Kishun. After this the decreeholder applied on the 18th of March, 1924, that the surety had deceived the court and that the house purporting to have been hypothecated did not belong to him, and prayed that the court might order realization of the decretal money from the surety personally.

The court ordered a warrant to issue for the arrest of the surety. Several attempts were made but they all proved infructuous. In May, 1924, the court ordered

the attachment of the house now in dispute. A copy of the order was duly served on the surety and attachment was effected. He did not appear to contest the order. The decree-holder then deposited expenses for sale, and notice under order XXI, rule 66 was issued to the surety for the purpose of drawing up the sale proclamation. Though it was duly served on him, he did not again appear, and his house was sold at auction. On the 20th of August, 1924, he filed an application purporting to be under order XXI, rule 90, for setting aside the sale on the ground that the decree-holder, without having taken any steps to get the property hypothecated sold, was not entitled to get the other property of the surety sold. Subsequently on the 26th of August, 1924, he filed an application purporting to be under section 47 of the Code of Civil Procedure for setting aside the sale on the same ground. While these applications were pending, the present suit for declaration was instituted on the 22nd of September, 1924. Then on the 29th of September, 1924, Ram Kishun's vakils stated before the court that they had no objection to the confirmation of the sale as they had filed a separate suit. The objections were accordingly dismissed and the sale was confirmed. Ultimately an appeal from that order was also dismissed by the District Judge.

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v.  
LALTA SINGHSulaiman,  
A. C. J.

In the reliefs claimed in the present suit there is no express prayer for setting aside the sale, although the sale had taken place before the suit was instituted. But there can be no doubt that the object of the suit is substantially to avoid the sale.

The main point urged on behalf of the plaintiff is that there was no personal liability of the surety to pay the money so long as it was not impossible to recover the amount from the property covered by the security bond.

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v.  
LALTA SINGHSulaiman,  
A. C. J.

Section 47 of the Code of Civil Procedure cannot in terms apply to a surety. It applies to parties to the suit and their representatives. The surety was no party to the suit at all and came on the scene long after the decree was passed. Indeed he appeared when a dispute arose between the auction purchaser and the decreeholder. The application of the surety did not come strictly under section 47.

No doubt section 145 provides that when a person has become liable as a surety, the decree may be executed against him to the extent to which he has rendered himself personally liable, in the manner provided for the execution of decrees, but although the procedure for the execution is the same, it does not follow that he is deemed to be a party to the suit itself. The provision in the section which says that he shall for the purposes of the appeal be deemed a party within the meaning of section 47 shows clearly that he is not a party to the suit, although he is of course a party to that particular proceeding in the original court, and for purposes of appeal only he is deemed to be a party to the suit itself. But the effect of this section is not to make section 47 wholly applicable to a surety.

In the case of *Raj Raghubar Singh v. Jai Indra Bahadur* (1) their Lordships of the Privy Council remarked that sections 47 and 144 apply only to the parties or the representatives of the original parties and do not apply to sureties. See also the cases of *Srinibash Prasad v. Kesho Prasad* (2), and *Ramanathan Pillai v. Doraiswami Aiyangar* (3).

It is thus clear that when no execution is being sought against a surety, he cannot be considered a party to the suit. It is also clear that if he executed a valid

(1) (1919) I.L.R., 42 All., 158 (186). (2) (1911) I.L.R., 38 Cal., 754 (766).

(3) (1919) I.L.R., 43 Mad., 325 (328).

hypothecation bond as security, the charge could be enforced by a separate suit.

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In the present case, however, no separate suit to enforce a charge could have been instituted. The security bond was an unregistered document and did not create a valid hypothecation. Furthermore, like the case before their Lordships of the Privy Council,—*Raj Raghubar Singh v. Jai Indra Bahadur* (1),—the bond before us does not hypothecate the property to any named mortgagee nor even to any officer of the court. Neither the decree-holder in his own right, nor as an assignee from an officer of the court, could have in a separate suit availed himself of the supposed security, as the deed did not bind the surety to any such person. The only way to enforce the unquestioned liability against the surety was by way of an order of the court against the surety that the money be realized by sale of his property. I am doubtful if in the case of an unregistered deed the court could have directed the sale of the property as if it were a charge. I am inclined to think that it would have had to attach the property mentioned in the security bond. But there can be no doubt that the court had ample jurisdiction to enforce the liability of the surety in an effective manner. The court did order execution to issue. It attached the surety's property. It ordered the sale to take place. The surety did not choose to come and represent to the court that the property should not be attached or sold. I am of opinion that if he wished to object to the execution proceedings against him, he ought to have appeared and shown cause.

Sulaiman,  
A. C. J.

The court was in no sense acting without jurisdiction. In the face of the amin's report, and in the absence of the surety, the court assumed that the decretal amount could not be recovered from the property mentioned in the security bond. The court had to decide this ques-

(1) (1919) I.L.R., 42 All., 158.

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v.  
LALTA SINGH.*Sulaiman,*  
A. C. J.

tion, and even if it erred in its decision, it would still have jurisdiction to proceed with the execution. The surety does not deny his liability to pay the money. His only complaint is that the court should have proceeded against the property mentioned in the security bond and not the property which has been sold. At best his objection is that the attachment of the second property was improper. This plea is based on the ground that the court erred in holding that the amount could not be recovered from the secured property. Putting the case at its highest in favour of the surety, the court only committed an error of judgement which would be a mere irregularity in the execution proceedings. An order passed against him by a competent court, even though in pursuance of some irregularity, is not a nullity but is binding upon him. He cannot have it set aside by another court in a separate suit.

No doubt his complaint that the court should not attach the other property did not fall under order XXI, rule 90, for that rule is confined to a material irregularity or fraud in publishing or conducting the sale. He did raise the point in both his applications dated the 20th of August and the 26th of August, 1924, and that point was decided against him by the execution court and the appellate court. Indeed his legal advisers thought it best not to press the objections at all. That rule undoubtedly applies to cases of irregularity or fraud covered by rules 89, 90 and 91.

If order XXI, rule 92, sub-clause (3) were taken literally, no suit would ever lie to set aside an order confirming a sale where any application under rules 89, 90 or 91 has been disallowed or not made at all. I am inclined to think that this rule cannot be understood in that wide and comprehensive sense. When the decree itself is being attacked on account of want of jurisdic-

tion, or even on account of fraud, undue influence or coercion, as distinct from any irregularity or fraud in the sale, I think a separate suit undoubtedly lies.

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It does not however follow that, where it was open to the surety to raise objections to the attachment of his property before the court lawfully seized of the matter, and he has failed to raise such objections, or his objections have been disallowed, the sale which is effected under the order of such court is liable to be set aside in a separate suit, even though a third party has purchased the property at auction.

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Section 11 of the Code of Civil Procedure which embodies the principle of *res judicata*, applies strictly to two separate suits, but it has been held that that section is not exhaustive, but the principle underlying it applies to orders passed in execution in the same suit: *Ram Kirpal v. Rup Kuari* (1), *Mungul Pershad Dichit v. Grija Kant Lahiri* (2), and *Raja of Ramnad v. Velusami Tevar* (3).

A judgement-debtor is defined in section 2, sub-clause (10), as any person against whom a decree has been passed or an order capable of execution has been made. By virtue of section 145, when an order for execution is made against a surety, he certainly becomes a judgement-debtor and the proceedings taken against him are in the nature of execution proceedings.

If an order in execution is passed without jurisdiction, it cannot be impugned in proceedings under rule 90, and the confirmation of the sale may not be an absolute bar. But here it is a case not of want of jurisdiction but of mere irregularity, and the orders passed against the surety by a competent court must be deemed to be final.

(1) (1883) I. L. R., 6 All., 269. (2) (1881) I. L. R., 8 Cal., 51.  
(3) (1920) L. R., 48 I. A., 45.

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I am, therefore, of opinion that he is bound by the order passed against him for issue of execution for attachment and the confirmation of the sale, and it is not open to him to go behind them and impugn them in a separate suit. I would therefore dismiss the appeal.

KING, J.:—I agree that the appeal should be dismissed. The plaintiff appellant sued for a declaration that a certain house could not be attached and sold in execution of a certain decree, and for a perpetual injunction restraining the defendants from taking any proceedings against the house in execution of the decree. In view of the fact that the house had been not merely attached, but even sold, long before the institution of the suit, it would have been futile to grant the injunction. The plaintiff was not entitled to claim a mere declaration in the terms prayed, without asking for the consequential relief that the sale be set aside. I think the court would have been justified in refusing relief on these grounds alone. The plaintiff had not suffered any injustice in being compelled to discharge a liability which he voluntarily undertook.

The appeal does, however, raise some difficult questions of law. The first point is whether the execution court was lawfully empowered to sell the house in suit without having first attempted to sell the hypothecated house.

The security bond purported to hypothecate a house No. 103/258, as security for the decree money. The surety undertook a personal liability for the said sum in case it could not be recovered from the hypothecated property. This bond could not be enforced by a mortgage suit for several reasons. The bond was unregistered, and therefore did not serve to create a mortgage. I think it could not even be held to create a charge. In any case it did not purport to create a mortgage or charge



in favour of any specified person. So even if it were not totally ineffective for want of registration, it could only be enforced by the court making an order for the sale of the property unless the surety paid the decree money: See *Raj Raghubar Singh v. Jai Indra Bahadur* (1). This was in fact the procedure which the court first contemplated. The court issued a warrant for the attachment of the hypothecated house. The amin reported that the boundaries of house No. 103/258 do not tally with the boundaries mentioned in the bond and that the house is in the possession and ownership of another person. The decree-holder himself confirmed this report. It appeared, therefore, that the surety had practised a fraud upon the court by purporting to hypothecate a house in which he had no interest whatever. In these circumstances, I think the court was perfectly justified in finding that the money could not be realized by sale of the hypothecated house and in proceeding to enforce the surety's personal liability under section 145 of the Code of Civil Procedure by attachment and sale of the house in suit.

The surety had notice of the attachment, and he made no objection. He had notice of the sale proclamation, and he kept silent. After the house had been duly sold the surety at last came forward with objections purporting to be made under order XXI, rule 90 and section 47. Before the objections could be decided he instituted this suit. After instituting the suit his vakil stated to the execution court that he did not wish to press the objections. The objections were accordingly dismissed and the sale confirmed. He even appealed against the order of confirmation but the appeal was dismissed.

On these facts is the suit maintainable? The suit is not expressly barred by section 47, since the surety is

(1) (1919) I. L. R., 42 All., 158 (167)



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certainly not a party to the suit. He is undoubtedly a "judgement-debtor" within the meaning of the Code of Civil Procedure, since he is a person against whom an order capable of execution has been made. Under section 145 the order may be executed against him in the manner provided for the execution of decrees. This apparently means that he is to be treated as a judgement-debtor for the purpose of proceedings under order XXI. It is also laid down that he shall "for the purposes of appeal be deemed a party within the meaning of section 47". I confess that I find great difficulty in interpreting these words. Apparently they mean that he is deemed to be a party within the meaning of section 47 for the purposes of appeal only and not for any other purpose. The maxim *Expressio unius est exclusio alterius* seems clearly applicable. Probably the meaning is that when an order is made by the execution court against a surety then the order shall be deemed to have been made under section 47 and to be a "decree" and therefore appealable. But this implies that questions relating to the execution of the decree may be determined by the execution court and not by separate suit. It also implies that the surety may make any objection which a judgement-debtor might make. Otherwise the execution court could not determine the questions. Under what rule or section is he to make objections? Supposing he objects to attachment, he cannot make his objection under order XXI, rule 58. Rules 58 to 63 must be read together and are clearly meant to provide for objections by outsiders and not to objections by judgement-debtors. Section 47 does not apply, since the surety is not a party to the suit and is only deemed to be such "for the purposes of appeal". The position is very anomalous. The surety is certainly a party to the execution proceedings, being in the position of a judgement-debtor. The legislature apparently in-

tends that he should be able to make objections in the court of execution proceedings, but does not make any express provision for such objections. It seems that we have to fall back upon the "inherent powers" of the court to receive and decide objections made by the surety.

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In any case we are faced by the difficulty that there is nothing in the Code providing that questions relating to the execution *must* be determined by the execution court and not by a separate suit. The surety is apparently at liberty to ignore the execution court and to institute a separate suit for the reliefs which he claims. I agree that the terms of section 47 do not bar the present suit.

The question then arises, when the surety does raise objections to the sale and when the execution court dismisses the objections and confirms the sale, and the order of confirmation is upheld in appeal (as in the present case), is the surety nevertheless entitled to treat these adverse decisions as a nullity and to re-agitate the same questions by instituting a separate suit?

I think the suit is barred by the principle of *res judicata* and also by order XXI, rule 92(3).

The suit is not barred in express terms by section 11, but we have the authority of the Privy Council for holding that section 11 is not an exhaustive statement of the application of the principle of *res judicata*. The principle applies to decisions made by a court in the course of execution proceedings: *Ram Kirpal v. Rup Kuari* (1). On this principle the decision of the execution court dismissing the surety's objections to the sale of the house, which decision was upheld in appeal, is binding upon the surety and bars this suit.

Order XXI, rule 92(3) also bars the suit in my opinion. The surety made an objection which purported to be made under order XXI, rule 90. This objection

(1) (1883) I. L. R., 6 All., 269.

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was dismissed as it was not pressed, and the sale was confirmed. The real aim of this suit is to set aside the order confirming the sale, and such a suit seems to be clearly barred by order XXI, rule 92(3). I have already mentioned that the plaintiff did not expressly claim the relief of setting aside the order of confirmation, probably because such a suit was *prima facie* barred by rule 92(3). Hence he asked for a mere declaration that the property could not be sold, although it would have been futile to grant such a declaration without granting also the consequential relief of avoiding the sale.

I am not prepared to hold that an order confirming a sale under order XXI, rule 92(1) is an absolute bar to a separate suit for setting aside the sale on any ground whatever, as for instance on the ground that the decree itself is vitiated by want of jurisdiction or fraud. In the present case at least no such defect can be imputed to the decree. The surety's only complaint was that the execution court proceeded to enforce his personal liability without first attempting to attach and sell the hypothe-cated house. The court had good reason to suppose that any such attempt would be wholly infructuous. At the very most, therefore, the court was guilty of irregularity of procedure and certainly did not act without jurisdiction in selling the house in suit. I concur with my learned brother in dismissing the appeal.

BY THE COURT :—The appeal is dismissed with costs.

## PRIVY COUNCIL.

RAJA UDIT NARAYAN SINGH (*since deceased*) v.  
MUBARAK ALI AND OTHERS.

J.C.\*  
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December,  
17.

[On appeal from the Board of Revenue for the United Provinces of Agra and Oudh.]

*Appeal to Privy Council—Competence of appeal—Order of Board of Revenue—Thekadar—Dispute as to entry in register—Dispute as to tenure in course of proceedings—Land Revenue Act (U. P. Act III of 1901) sections 32, 42, 44.*

A thekadar, registered under the United Provinces Land Revenue Act, 1901, purported to transfer his theka to his son and grandson, who applied for mutation of names. The superior proprietor, being given notice, objected that the theka had been forfeited by the transfer, and that the transferees were merely tenants. The Assistant Collector upheld that contention. The transferor thereupon brought a civil suit against the transferees and obtained a decree by consent that the gift was incomplete and passed no title. He then appealed in the mutation proceedings, and eventually the Board of Revenue ordered therein that the transferor should be re-entered as thekadar. The superior proprietor appealed to the Privy Council.

*Held* that the appeal did not lie. A thekadar being a “proprietor” within the meaning of section 32, the dispute was one as to an entry in the register maintained under section 32(a), and while by section 44 the decision did not bar a civil suit, no appeal to the Privy Council was given. The dispute not being under section 32(e) it was not necessary to decide whether section 42, which provides that the Code of Civil Procedure shall apply to the trial of particular disputes within section 32(e), had in those disputes the effect of giving a right of appeal under the Code.

\**Present* :—Lord PHILLIMORE, Lord ATKIN, Lord SALVESSEN, Sir JOHN WALLIS and Sir LANCELOT SANDERSON.

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APPEAL (No. 140 of 1927) from an order of the Board of Revenue of the United Provinces of Agra and Oudh (December 9, 1925) reversing an order of the Commissioner, Fyzabad Division.

The facts of the litigation and the orders made by the Revenue Courts therein appear from the judgement of the Judicial Committee.

Shortly before the hearing of the present appeal the respondents gave notice to the appellant contesting the competence of the appeal; that question only was argued upon the appeal coming on for hearing.

1928. November 12, 16. *Dunne, K.C.* and *Jopling* for the respondents :—This appeal does not lie. Having regard to the definition of a “thekadār” in the Oudh Rent Act, section 3, and the explanation added to section 32 of the Land Revenue Act, the application was for entry in the register kept under section 32(a) of the latter Act, not under section 32(e). There was no dispute as to the “class of tenure of any tenant” within section 42. The superior proprietor should not have been joined. Any dispute which arose in consequence ceased to be material when the transfer was declared by a civil court to be a nullity. The order now appealed from had reference solely to the register under section 32(a). Under the Land Revenue Act, sections 40, 44, entry in the register did not preclude a civil suit, and there is no provision applying the Code of Civil Procedure or giving a right of appeal to the Privy Council. In these circumstances no appeal lies : *Rangoon Botatoung Co. v. Collector of Rangoon* (1).

*DeGruyther, K. C.* and *E. B. Raikes* for the appellant :—The litigation was a dispute “respecting the class or tenure of a tenant” within section 42 of the Land Revenue Act. As to such disputes that section provides

(1) (1912) I.L.R., 40 Cal., 21; L.R., 39 I.A., 197.

that the procedure under the Oudh Rent Act, 1886, is to be followed, and by section 135 of that Act the Code of Civil Procedure is applied. Consequently the provisions of the Code as to appeals to the Privy Council apply. There were appeals to the Privy Council from the Board of Revenue in *Parbati Kunwar v. Deputy Commissioner of Kheri* (1) and *Rani Bijai Raj Kunwar v. Jai Indar Bahadur* (2). [Reference was made also to *Bishun Nath Saran Singh v. Shankar* (3)].

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*Dunne, K.C.* in reply :—The two cases in which appeals from the Board of Revenue were heard were of an entirely different nature from the present case; further, the competence of the appeals was not argued. Even if there was a dispute within section 42, that section provides that the procedure under the Rent Act is to apply “in the trial” of the dispute; that does not make applicable the provisions of the Code as to appeals to the Privy Council.

December 17. The judgement of their Lordships was delivered by Sir JOHN WALLIS :—

In this case the Board of Revenue of the United Provinces granted Raja Udit Narayan Singh, since deceased, who will be referred to as the appellant, leave to appeal to His Majesty in Council from their order directing that the first respondent, Shaikh Mubarak Ali, should be re-entered on the register maintained by the revenue authorities under the United Provinces Land Revenue Act, III of 1901, as a thekadar or holder of a permanent but not transferable lease in a village of which the appellant was the proprietor.

The first respondent had purported to transfer his theka or lease to his son and grandson, the second and third respondents, with the object, it was alleged, of

(1) (1918) I.L.R., 40 All., 541; (2) (1922) I.L.R., 44 All., 435;  
L.R., 45 I.A., 111. L.R., 49 I.A., 262.  
(3) (1924) 11 Oudh L. J., 687.

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defeating the rights of succession of his other heirs under the Muhammadan law. On their application for mutation of names they were erroneously entered as *pukhtadari* tenants, a term applicable to tenants holding under a sub-settlement. They then applied that they might be entered as *matahatdars*, a description applicable to under-proprietors or persons holding a heritable and transferable right in the land as defined in clause 15 of section 4 of the United Provinces Land Revenue Act, III of 1901. The revenue authorities corrected the register but entered them as thekadars, the description under which their transferor, the first respondent, had been entered.

They then applied to the Assistant Collector who ordered notice to go to the appellant as the superior proprietor. The appellant appeared and objected that the permanent lease had been forfeited by the transfer and that the transferees were at most mere tenants. The Assistant Collector upheld this contention and directed them to be registered as tenants (which, as will be seen, means tenants of the lands actually cultivated or otherwise occupied by them), that is to say, he upheld the appellant's contention that the theka had been forfeited and that they were not entitled to be entered either as thekadars or as *matahatdars*.

The first respondent thereupon sued the second and third respondents for a declaration that his gift to them was incomplete and no title had passed, and obtained a decree by consent. He then appealed to the Deputy Commissioner who ordered the second and third respondents to be registered as thekadars. This order, on appeal by the appellant here, was reversed by the Commissioner, who restored the order of the Assistant Collector. The first respondent then appealed to the Board of Revenue, who, after making the second and third respondents, parties here, respondents in that appeal, held that transfer in their favour was invalid and directed that the name



of the first respondent should again be entered as the-  
kadar. It was from this order that the appellant obtain-  
ed leave to appeal to His Majesty in Council.

At the hearing before their Lordships, Mr. *Dunne* took a preliminary objection that no appeal lay, and Mr. *DeGruyther*, for the appellant, contended that the order under appeal had been made in the course of an inquiry as to "a dispute respecting the class or tenure of any tenant" within the meaning of section 42 of the Land Revenue Act, as to which it is provided that the Collector in the trial of the dispute is to observe the procedure prescribed for cases of a similar kind for the trial of suits under the Oudh Rent Act, XXII of 1886. As by section 135 of that Act, save as otherwise provided, the provisions of the Code of Civil Procedure are applied to all suits and proceedings under that Act, Mr. *DeGruyther* contended that the provisions of the Code as to granting leave to appeal to His Majesty's Council were applicable to the present case. For the respondents it was contended that section 42 was not applicable, and, even if it were, it merely directed the Collector in the trial of the dispute to observe the provisions of the Civil Procedure Code, and did not provide that that procedure should be observed as to appeals from his order.

It is unnecessary to deal with the latter contention because, in their Lordships' opinion, the dispute was about an entry in the register maintained under clause (a) and not under clause (e) of section 32, and because disputes about entries in register maintained under clause (a) are to be decided, not in accordance with the provisions of section 42, but in accordance with the provisions of section 40, which does not make any of the provisions of the Civil Procedure Code applicable.

These sections are to be found in Chapter III of the Land Revenue Act, "*Maintenance of Maps and Registers*," and come under the sub-heading "*Registers*."

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Section 31 requires lists to be prepared and maintained of all revenue-paying mahals, or revenue divisions, specifying the revenue assessed and the person by whom it is payable, and also of all revenue-free mahals. Then comes section 32, which provides that for every mahal or village in a mahal there is to be a record-of-rights, which is to include the following registers :

(a) a register of all the proprietors in the mahal, including the proprietors of specific areas, specifying the nature and extent of the interest of each;

(b) in Oudh, for all mahals or pattis held in sub-settlement or under a heritable non-transferable lease, the rent payable under which has been fixed by the Settlement Officer or other competent authority, a register of all the under-proprietary co-sharers or co-lessees, specifying the nature and extent of the interest of each of them;

(c) in Oudh, a register of all other under-proprietors in a mahal, and all other lessees whose rents have been fixed by a Settlement Officer, or other competent authority, specifying the nature and extent of the interest of each of them;

(d) a register of all persons holding land revenue-free, specifying the nature and extent of the interest of each;

(e) a register of all persons cultivating or otherwise occupying land, specifying the particulars required by section 55.

*Explanation.*—In this section the words “proprietor” and “under-proprietor” include a person in possession of proprietary or under-proprietary rights under a mortgage or lease.

Now a thekadar, who is referred to in section 3, clause 10, of the Oudh Rent Act, as “a person to whom the collection of rents in a village or portion of a village has been leased by the landlord” is clearly a person in possession of proprietary rights under a lease within the meaning of the explanation, and so to be entered in the register of proprietors under (a); and it is also clear that the dispute between the appellant the proprietor and the respondents was, whether after the transfer by the first

respondent to the second and third respondents the theka had not been forfeited so that neither the first respondent, the transferor nor the second and third respondents were entitled to be entered in that register.

It is also clear that merely as thekadars they would not be entered in register (e) as contended for the appellant. Section 55 provides that the register maintained under (e) shall specify as to each tenant the nature and class of his tenure as determined by the Oudh Rent Act and the rent payable by the tenant, and shall also specify the proprietors or under-proprietors (if any) holding land as *sir* (or home farm land), or cultivating land, not being *sir*, otherwise than as tenants, and stating with regard to the latter class of lands the number of completed years during which they have been so cultivated. It is clear, therefore, that proprietors and under-proprietors and those claiming under them by lease or mortgage are not to be entered in this register, except in so far as they themselves actually occupy or cultivate land in the village, and that it cannot otherwise include persons in possession of proprietary rights under a mortgage or lease such as a thekadar.

It has next to be considered how disputes as to entries in register (a) are to be decided. Section 33 requires the Collector to record in the registers all changes that may take place and any transaction that may affect any of the rights and interests recorded. And under section 34 every person obtaining possession by transfer of any proprietary right in a mahal, or part of a mahal, or the profits thereof, or in any specific area therein, which is required to be recorded in registers (a) to (d) of section 32 is required to report the transfer, and no revenue court is to entertain a suit or application by him until he has done so. If there is a dispute about the transfer section 35 requires the Tahsildar to refer

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the case to the Collector, who is to dispose of it after deciding the dispute in accordance with the provisions of section 40.

Section 40 provides that all disputes as to entries in the annual registers are to be decided on the basis of possession, and if the Collector cannot satisfy himself as to which party is in possession, he is to ascertain by summary inquiry who is the person best entitled to the property and shall put such person in possession, but no order as to possession under this section is to bar anybody from establishing his right to the property in any civil court; and it is further provided by section 44, that no entry or decision under section 40 is to affect the right of any person to claim and establish in the civil court any interest in land which requires to be recorded in the registers (a) to (d) of section 32.

It is their Lordships' opinion clear that all the Collector could do besides amending the register after the summary inquiry under section 40 was to put the successful party into possession, and that his order would not debar the unsuccessful party from asserting his rights by suit in a civil court. It is therefore not surprising that there is no provision of law making the summary inquiry under section 40 subject to the Civil Procedure Code so as to render the order made by the Board of Revenue in such an inquiry appealable to His Majesty in Council.

In this view it is unnecessary to consider the effect of the provisions of section 42, which applies the provisions of the Civil Procedure Code to the trial of particular disputes as to certain entries to be made in the register maintained under clause (e)—apparently because under section 44 the decision is to be binding on revenue courts which have exclusive jurisdiction in suits relating to the same matter.

In their Lordships' opinion the appellant has failed to show any right to appeal to His Majesty in Council, and the appeal should be dismissed with costs, save only that the costs of preparing and lodging the respondents' case must be borne by the respondents themselves, as the objection was only taken at the hearing. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *T. L. Wilson and Co.*

Solicitor for respondents: *H. S. L. Polak.*

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J.C.\*  
1929

March, 19.

[On appeal from the High Court at Allahabad.]

*Indian Limitation Act (IX of 1908), articles 134, 140—Mortgage—Reversioner's suit to redeem—Transfer of possession by mortgagee.*

When a mortgagee has transferred possession of the mortgaged property for a valuable consideration, a suit to redeem by a plaintiff who at the date when the mortgagee transferred possession had a contingent interest in remainder in the property is governed by article 140, and not by article 134, of the Indian Limitation Act, 1908; the suit consequently is not barred if it is brought within twelve years from the date when the plaintiff's estate falls with possession, even though it is brought more than twelve years after the date of the transfer under which the defendant claims.

Decree of the High Court, I.L.R., 47 All., 803, reversed.

APPEAL (No. 86 of 1927) from a decree of the High Court (March 27, 1925) reversing a decree of the Subordinate Judge of Muzaffarnagar (January 20, 1923).

The suit was brought by Alice Georgina Skinner to recover possession of five villages by redemption of a mortgage executed in 1863 by her father. The plaintiff

\*Present:—Lord CARSON, Lord ATKIN and Lord SALVESEN.

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had become entitled to the villages in 1919 under her father's will upon the successive deaths without issue of her three brothers. The defendant purchased the villages in 1904 from the Nawab of Rampur to whom the mortgagees, acting as absolute owners, had mortgaged, and had subsequently sold them, in 1898 and 1903 respectively. The plaintiff died before the appeal to the High Court; the present appellant was her executor.

The facts appear fully from the judgement of the Judicial Committee.

The effect of the will of the plaintiff's father and the position as to mortgages created by him were dealt with by the Board in 1913 in *Skinner v. Naunihal Singh* (1).

The Subordinate Judge made a decree in favour of the plaintiff; he held that article 140 of the Indian Limitation Act, 1908, applied, and that consequently the suit was not barred by adverse possession as the defendant had pleaded.

Upon appeal to the High Court the defendant raised the contention that the suit was barred by article 134. The learned Judges (LINDSAY and KANHAIYA LAL, JJ.) held that that article applied and that it controlled both article 140 and article 148; the appeal was therefore allowed and the suit dismissed. The appeal is reported at I.L.R., 47 All., 803.

1929. February 21, 22, 25. *DeGruyther, K.C.* and *Kenworthy Brown*, for the appellant:—When the mortgagees were put into possession and when they transferred the property the plaintiff had an interest in remainder which was not thereby affected. The suit being by a remainderman is governed by article 140 and therefore is not barred. That view is supported by *Runchordas v. Parvatibai* (2). The plaintiff cannot

(1) (1913) I.L.R., 35 All., 211; (2) (1899) I.L.R., 23 Bom., 725; L.R., 40 I.A., 105. L.R., 26 I.A., 71.

have lost her right to redeem before she became entitled to do so. The view in the High Court renders article 140 of no effect. But in any case article 134 applies to a mortgaged property only when a mortgagee in possession under the mortgage has purported to transfer an absolute interest. Here the mortgagees at the date of the transfer were not in possession under the mortgage of 1863, but under a defective absolute title, and transferred that title. [Reference was made also to *Husaini Khanam v. Husain Khan* (1), *Ram Piari v. Budh Sen* (2) and *Bhup Singh v. Zain-ul-abdin* (3).]

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*Upjohn, K.C.* and *Dube*, for the respondent:—  
Article 134 applies exactly to this case. More than twelve years before the suit there was a transfer of possession by a mortgagee for valuable consideration. In *Radanath Doss v. Gisborne* (4) Lord CAIRNS, in referring to the corresponding provision of the Act of 1859, says it means a purchaser of "a *de facto* mortgage upon a representation made to him, and in the full belief, that it is not a mortgage, but an absolute title." That language applies, if not to the mortgage of 1898, to the sale of 1903. The respondent is supported by *Husaini Khanam v. Husain Khan* (1) and cases there cited. Article 134 is to be regarded as an exception out of article 148. Article 140 does not apply. The article applies only to reversionary interests created by a settlement. In India an equity of redemption is not an estate; see Transfer of Property Act, 1882, section 60. Here the wrongful possession occurred while a person entitled in fee had the right to sue; time began to run, and under section 9 continued to do so. The plaintiff was not a reversioner for the purpose of article 140; *Kashi Prasad v. Inda Kunwar* (5).

*Kenworthy Brown* replied.

- (1) (1907) I.L.R., 29 All., 471. (2) (1920) I.L.R., 43 All., 164.  
(3) (1886) I.L.R., 9 All., 205. (4) (1871) 14 Moo. L.A., 1 (16).  
(5) (1908) I.L.R., 30 All., 490 (498).

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March, 19. The judgement of their Lordships was delivered by Lord ATKIN :—

This is an appeal from the High Court at Allahabad in a suit brought by Mrs. Alice Georgina Skinner against the respondent for the redemption of five villages specified in the plaint. The question that has to be determined by this Board is whether the defendant is protected by article 134 of the Limitation Act of 1908. The suit involves the dispositions of the property of the plaintiff's family which have been the subject of litigation in India on previous occasions. For the present purpose it is necessary to state the material facts in order of date.

In September, 1863, Thomas Skinner, the plaintiff's father, mortgaged the villages in suit together with other property to Seth Lakshmi Chand and Seth Gobind Das for the sum of Rs. 50,000. It was a simple mortgage, with a covenant to pay the principal on the 31st of December, 1863, and to put the mortgagees in possession if there was default in payment of principal and interest. The principal was not duly paid; but it does not appear that the mortgagees took possession at any rate during the mortgagor's lifetime. In October, 1864, Thomas Skinner made a will by which in the events that happened he left successive life interests to three of his sons with ultimate remainder to his daughter, the plaintiff. Each interest was contingent on the holder of the prior estate dying without male issue; but the three sons who were successively life tenants did die without lawful issue. In November, 1864, Thomas Skinner died, and his eldest son, Thomas Browne Skinner, became tenant for life. In fact, however, Thomas Browne Skinner assumed an absolute interest in the property: it was not until the will of his father received interpretation from this Board in 1913 in a suit brought by the second son that the limited interests were judicially ascertained.



Acting as absolute owner in November, 1867, Thomas Browne Skinner mortgaged the property which was the subject of the original mortgage of 1863 to Seth Gobind Das for the sum of Rs. 50,000, which was expressed to include Rs. 43,294 due on the original mortgage. The principal sum and interest was to be paid in eight years. The name of Seth Gobind Das was to be entered in the revenue papers as mortgagee and that of Thomas Browne Skinner as proprietor; the mortgagor was to continue to collect the rents under the supervision of agents of the mortgagee and the proceeds less agreed deductions were to be applied to reducing the amount due. In 1872, money decrees were obtained against Thomas Browne Skinner and his equity of redemption in the villages in suit was sold in execution and bought by Seth Lakshmi Das, who therefore entered into possession of them on the footing of being absolute owner. It will be observed that the above transactions took place in the names of Gobind Das, and Lachman Das respectively, but it has been assumed throughout, no doubt accurately, that the parties duly represented the original mortgagees of the mortgage of September, 1863. On the 26th of December, 1898, Lachman Das, purporting to be absolute owner, mortgaged with possession the five villages with much other property to the Nawab of Rampur for Rs. 15,00,000 "with all the proprietary and zemindari rights." On the 24th of September, 1903, the Collector of Muttra, acting as guardian of the infant sons of Lachman Das, sold the whole of the mortgaged property together with jewellery, which had been the subject of a previous mortgage, to the Nawab of Rampur in satisfaction of all claims under the mortgages. The conveyance transfers all the estate right, title and interest of the wards in the property which included, of course, the five suit villages. On the 11th of April, 1904, the Nawab of Rampur sold the five villages to the respondent, Naunihal Singh, for

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Rs. 1,77,000. The purchaser had the prudence to take what appears to be a warranty of title, for which he may ultimately have occasion to be grateful. Meantime, in 1900, Thomas Browne Skinner died. He was succeeded by his brother, Richard Ross Skinner, who, in 1906, commenced a suit against the present respondent, amongst others, to recover possession of the suit villages and other property. In this suit it was decided by this Board, reversing the decision of the High Court, that under the will of Thomas Skinner, his son, Thomas Browne Skinner, took only a life interest, and therefore respondent's predecessors in title could not have acquired through him an absolute interest. They held, however, that though Lachman Das did not acquire an absolute interest from Thomas Browne he yet, notwithstanding the terms of the mortgage of 1864, must be held to be still entitled to his rights under the mortgage of 1863 created by Thomas Skinner. These rights, it was held, passed to the subsequent purchasers, and therefore the plaintiff Richard Ross Skinner was not entitled to recover possession of the property except on condition that he redeemed the mortgage security. The suit was remitted for this condition to be performed, but in 1913 Richard, the plaintiff, died and the suit abated. He was succeeded by his brother George who, in 1917, filed a suit for redemption against the present respondent and others in respect of the five suit villages and other property. However, in 1919, George died and his suit abated. He was succeeded by his sister Alice, who brought her suit for redemption against the present respondent and others for recovery of possession and redemption of the suit villages and other property. In the course of the proceedings Mrs. Alice Skinner, the plaintiff, died, but as she had acquired an absolute interest this suit was not abated, and is continued by

James Skinner; her executor, the present appellant. By their written statement the defendants disputed the plaintiff's title and claimed to have been in adverse possession by themselves or their predecessors since 1872. The learned Subordinate Judge found in favour of the plaintiff's title as to which there is now no dispute. He held that the defendants could not avail themselves of adverse possession both because the time for redemption was, by article 148 of the Limitation Act, 60 years which had not expired, and because in any case, by article 140, the plaintiff's right to sue did not arise until 1919, when after the death of the tenants for life she, by virtue of the remainder to her, became entitled to possession. The learned Judge therefore decided in favour of the plaintiff and made a preliminary order on the 28th of February, 1922, that the defendants should within a month deliver accounts of the income received from the villages during their possession in order that he might arrive at a fixed sum. This order not being appealed, on the 20th of January, 1923, the learned Judge made a preliminary decree for redemption in which he fixed the sum due to the defendants on account of principal, interest and costs to be Rs. 1,09,641, and decreed that if the plaintiff paid that sum into Court before the 3rd of July, 1923, the defendants should re-transfer the property to her and that on default by the plaintiff the property should be sold. From this decree an appeal was brought and by permission of the High Court a further appeal was entered from the order of the 28th of February, 1922. On the hearing before the High Court the defendants for the first time raised the defence that they were entitled to succeed by reason of the provisions of article 134, which fixed the period of limitation for a suit, "to recover possession of immovable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mort-

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gatee for a valuable consideration," at 12 years from the date of the transfer.

No evidence had been given in the Court below to support the plea. Such evidence must include all the documents of mortgage and sale which have been set out above, and which had not been proved or printed. The learned Judges, however, came to the conclusion that as there could be no doubt as to the material facts and as the necessary documents had been printed before in the case decided by the Privy Council in 1913 they should allow the point to be argued. Their Lordships cannot approve of this decision, which appears to have been made against the protests of the then respondents. It appears to their Lordships to be highly irregular for any Court either to assume without the admission of all parties that material facts are not in dispute or to proceed to draw inferences from those facts where no evidence of them has been placed before the Court. The position is not improved where the matter is mooted for the first time in an appellate Court on a point not taken before the trial Judge. Their Lordships would have felt a difficulty in permitting the respondent to rely upon this ground before them were it not that before the Board the appellant consented to the question being raised on the materials placed before the High Court. With this expression of opinion upon the procedure below their Lordships therefore proceed to determine the appeal.

When the facts and documents are examined it appears that the defence founded on article 134 cannot be supported. (The transfer of property mortgaged contemplated by article 134 is admittedly something other than an express transfer of the original mortgage. The article contemplates a transfer by a mortgagee purporting to transfer a larger interest than that given by the mortgage or at any rate an interest unencumbered by a

mortgage. Such an interest purported to be transferred by Lachman Das mortgage to the Nawab of Rampur in 1898 where the mortgagor purported to mortgage as absolute owner; and also purported to be transferred by the sale in September, 1903, under which the respondent claims his absolute title. Their Lordships have little doubt that had Thomas Browne Skinner had the absolute title to the equity of redemption at the time when Lachman Das purported to transfer the absolute title to the Nawab the case would have been brought within section 134.

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The appellant sought to put a limited construction on the article by contending that it only applied where the transfer took place while the mortgagee was mortgagee, or at any rate transferred possession which he had obtained as mortgagee. It did not apply, they said, where, as here, the mortgagee had apparently ceased to be mortgagee by getting in the equity of redemption, and had obtained possession not under the mortgage but under the purchase of the equity in 1872. Their Lordships see no reason for accepting this view. It appears to them to be immaterial that the mortgagee should have thought he was absolute owner if in fact he was mortgagee; and immaterial whether he got possession before, under or after the mortgage if in fact he purported to transfer the property to the transferee. But in the present case the transfer which is *ex concessis* ineffective to give the absolute title was made during the existence of the particular estate vested in Thomas Browne Skinner, and in such a case the provisions of article 140 apply. It was, indeed, faintly contended by the appellant that the plaintiff claiming only an equity of redemption did not come within the meaning of a remainderman. It appears to their Lordships that so to hold would be to do violence to the language and

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reasoning of this Board in *Skinner v. Naunihal Singh* (1), and would be inconsistent with the ordinary meaning of the term.

Whether Thomas Skinner settled the estate subject to the incumbrance or whether he settled the equity, in either case he created a contingent remainder which vested in the plaintiff in possession in 1919 on the death of the last of her brothers without issue. So far, therefore, as the defendant relies upon the enjoyment of the absolute title for 10 years from the transfers from Lachman Das and his successors in 1898 and 1903 he is defeated by the provisions of section 140. It is unnecessary to add that if the transfer ultra the mortgage interest had taken place in the lifetime of Thomas Skinner, the settlor, so that time had begun to run in his lifetime, article 140 would not have availed the plaintiff. This is in accordance with section 9 of the Limitation Act which itself follows the provisions of the English law. As it is, however, the defendant is defeated in his enjoyment of the absolute title by the provisions of article 140. He then has to fall back upon the transfer to him of the mortgage interest of Lachman Das in the original mortgage of 1863 which, according to the decision of the Privy Council in 1913, was *quoad tantum* transferred to him in the folds of the larger title which he thought he was getting. But if he has to rely upon a mortgage title then he must take it subject to the obligation of all mortgage titles, viz., the obligation to be redeemed. It is conceded and is plain that article 134 does not protect the transferee of a mortgage by express transfer, and it appears to their Lordships idle to suppose that it protects a person who has taken a transfer only of a mortgage, but has taken it without his knowledge mistakingly supposing that he was getting something better in circumstances like the present, where he cannot maintain his

(1) (1918) I.L.R., 35 All., 211; L.R., 40 I.A., 105.

superior title by reliance on any period of limitation. Resting as he does on the interest of mortgagee he is liable to be redeemed. The period of redemption began, it is true, in the lifetime of Thomas Skinner, and article 140 has no application but the statutory period runs for 60 years and had not expired when the plaintiff filed the present suit.

Their Lordships therefore are of opinion that this appeal should be allowed with costs here and below and the order of the Subordinate Judge restored, and that the case should be remitted to the High Court to make such additions to the decree as may seem just to the plaintiff in view of the fact that possession has been withheld from him and his testatrix since the date fixed in the preliminary decree. The right to possession will be governed by the preliminary decree with which, as their Lordships are informed, the plaintiff has complied. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *Chapman-Walker and Shephard.*

Solicitors for respondent: *Douglas Grant and Dold.*

### MISCELLANEOUS CRIMINAL

*Before Mr. Justice Dalal.*

EMPEROR *v.* BHAIRON PRASAD.\*

*Criminal Procedure Code, sections 190, 197, 202, 561A—Cognizance—Jurisdiction of Magistrate to take cognizance—Search and seizure of property by District Magistrate on complaint of an offence requiring sanction under section 197—High Court's power of interference—Act (Local) No. II of 1916 (U. P. Municipalities Act), section 82(1)—Public servant.*

Where a District Magistrate, on receipt of a complaint that a member of a Municipal Board had by contravening section 82(1) of the U. P. Municipalities Act committed an

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offence under section 168 of the Indian Penal Code, and in the absence of sanction of the Local Government required by section 197 of the Code of Criminal Procedure, took cognizance and started an inquiry and under his orders a Subordinate Magistrate searched the house of the accused and seized his account books: *Held*, that the District Magistrate had no jurisdiction to take cognizance as he had done and that the High Court had inherent power to interfere, under section 561A of the Code of Criminal Procedure, and even independently of the Code.

THE facts of the case are fully set forth in the judgment of the Court.

Munshi Kumuda Prasad, for the applicant.

The Government Advocate (Pandit Uma Shanker Bajpai), for the Crown.

DALAL, J. :—This Court is much handicapped by neither the Deputy Magistrate Mr. Wali Bakht nor the District Magistrate of Agra quoting (except in one instance in one report) a single section of the Code of Criminal Procedure, which is the only Code laying down rules for the guidance of Magistrates in the procedure that they should follow. It appears that a complaint, possibly anonymous, was made to the District Magistrate against Babu Bhairon Prasad to the effect that he being a member of the Municipal Board of Agra acquired a share in a contract with the Board. Such conduct on the part of a member of a Municipal Board is prohibited by the provisions of section 82(1) of the U. P. Municipalities Act of 1916 and is made punishable as if the member who acquired an interest in the contract had committed an offence under section 168 of the Indian Penal Code. It appears that (though it cannot be said for certain as no specific details are given by either Magistrate, and the learned Government Advocate was not in possession of all the details), the District Magistrate immediately took cognizance and started an inquiry, which inquiry could only be under section 202



of the Code of Criminal Procedure. The account-books of B. Bhairon Prasad were taken possession of after a search of his house and examined under the order of the District Magistrate to discover whether the complaint as to his contract with the Municipality contrary to law was correct or not. It appears further from the report of Mr. Wali Bakht that the examination has revealed further alleged offences committed by B. Bhairon Prasad.

In my opinion the District Magistrate had no jurisdiction whatsoever to take cognizance as he has done. The learned Government Advocate was inclined to think that the District Magistrate was acting in his capacity as executive officer. An "executive officer" is nowhere defined so far as I know, and the argument possibly means that Mr. Nethersole, being head of the Agra district, can do what he pleases within the limits of that district without reference to the Code of Criminal Procedure. The District Magistrate himself, however, does not lay claim to any such power and has specifically stated in his report that Mr. Bakht undertook the inquiry in consequence of orders passed by Mr. Nethersole as District Magistrate for inquiry into a specific complaint of misconduct as a Municipal member on the part of Lala Bhairon Prasad in connection with certain gram contracts. Obviously, therefore, Mr. Nethersole claims to have taken action under sections 190 and 202 of the Code of Criminal Procedure. This disposes of the question whether the High Court has jurisdiction or not to interfere in this case. In whatever capacity any officer of the Crown in certain actions taken by him orders search of the house of a public servant or of a subject of the Crown, I think that this Court would have jurisdiction independently of the Code. "Nothing in the Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent

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abuse of the process of any court, or otherwise to secure the ends of justice" (section 561A of the Code of Criminal Procedure). I have no doubt whatsoever as to the authority or ability of this Court to interfere in the present matter.

Section 190 of the Code does give a District Magistrate authority to take cognizance of an offence upon information received from any person or upon his own knowledge or suspicion that such offence has been committed. Even if the knowledge or suspicion was based on an anonymous letter, that will be sufficient to entitle him to take cognizance, provided there was no bar to the taking of such cognizance. In the present case, however, cognizance is barred under the provisions of section 197 (1) of the Code of Criminal Procedure. When any public servant who is not removable from his office save by or with the sanction of the Local Government or some higher authority is accused of any offence alleged to have been committed by him while acting, or purporting to act, in the discharge of his official duty, no court shall take cognizance of such offence except with the previous sanction of the Local Government. Not only the sanction of the Local Government is necessary, but by sub-section (2) of section 197 the Local Government has to determine the person by whom and the manner in which the prosecution is to be conducted, and may specify the court before which the trial is to be held. Until such sanction is received no Magistrate can take cognizance under section 190 of the Code of Criminal Procedure. So far as I understand the two reports of the Magistrates, no such sanction has so far been received. Under the circumstances the action of the District Magistrate, and under his orders of the Deputy Magistrate, has been entirely without jurisdiction. If we go further and inquire as to how proceedings may be taken

under section 202, we find the same bar. Any Magistrate on receipt of a complaint of an offence of which he is authorized to take cognizance may postpone the issue of process for compelling the attendance of the person complained against, and either inquire into the case himself or direct an inquiry to be made by any Magistrate subordinate to him. Here also the complaint has to be of an offence of which the Magistrate has authority to take cognizance. I have already pointed out that the District Magistrate in this particular case was barred under the provisions of section 197 from taking cognizance, and so he had no authority to direct inquiry by a Magistrate subordinate to him. When the law has provided safeguards, there must be some reason for providing them, and a Magistrate cannot be permitted to behave as if no safeguards had been provided by law.

Reference was made by the learned Government Advocate to the provisions of section 523 of the Code of Criminal Procedure. Those provisions have no application whatsoever to the present case.

In the result I direct both the District Magistrate and the Magistrate in charge of the inquiry to stay all proceedings and to return whatever property may have been obtained on search of the house of Babu Bhairon Prasad.

A copy of this order shall be sent to the District Magistrate.

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## REVISIONAL CRIMINAL.

*Before Mr. Justice Dalal.*EMPEROR *v.* PRAG DATT.\*1928  
July, 24.

*Criminal Procedure Code, sections 190(b), 195(1)(b)—Act No. XLV of 1860 (Indian Penal Code), section 211—Complaint to police—Subsequent similar complaint in court—Prosecution for false charge—Cognizance on written report of police officer—Written complaint of court not required.*

When a false charge is made to the police an offence under section 211 of the Indian Penal Code is complete; and it cannot be said, merely because a similar complaint was subsequently made in a court, that the offence was committed in, or in relation to any proceeding in any court, within the meaning of section 195(1)(b) of the Code of Criminal Procedure. A complaint in writing of such court is not, therefore, necessary for prosecution for such offence.

A Magistrate has the power to take cognizance under section 190(b) of the Code of Criminal Procedure on a written report by a police officer, without that officer having taken action under section 195(1)(a).

THE facts of the case are fully set forth in the judgment of the Court.

Mr. *Hamid Hasan*, for the applicant.

The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

DALAL, J. :—The Court had the advantage of listening to very helpful arguments from the Assistant Government Advocate and from Mr. *Hamid Hasan*.

One Prag Datt complained to the police that certain persons committed an offence. This was done on the 9th of October, 1927. Subsequently he lodged a com-

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\*Criminal Revision No. 374 of 1928, from an order of L. S. White, Sessions Judge of Cawnpore, dated the 10th of April, 1928.

plaint in the court of a Magistrate on the same allegations on the 17th of October, and the complaint was dismissed after inquiry on the 2nd of November, 1927. A revision application to the court of the Magistrate was dismissed in December of that year. Subsequently the Superintendent of Police of Cawnpore sent a written complaint to the District Magistrate for the prosecution of Prag Datt on a charge under section 211 of the Indian Penal Code, and the trial is being held by a Deputy Magistrate, Mr. Mathur. On the 23rd of February last, on objection being raised by Prag Datt as to the Magistrate's jurisdiction, the Magistrate gave reasons affirming his jurisdiction and directing the trial to proceed. A revision application from that order was dismissed by the learned Sessions Judge of Cawnpore.

I do not agree with the summary view taken by the Judge that so long as there is a sanction by any authority it will be sufficient to satisfy the requirements of section 195 of the Code of Criminal Procedure. I have examined the case-law on the subject, and there appears to be conflict of authority between this Court and the Calcutta High Court. In a case like the present two Divisional Benches of the Calcutta High Court have held that the provisions of section 195(1)(b) would apply, and that there could be no prosecution without the sanction of the court where the complaint was subsequently made in court. In the present case it will be noticed that no such sanction was obtained. The judgement of the Bench in *Brown v. Ananda Lal Mullick* (1) was delivered by the learned CHIEF JUSTICE, who referred to a similar opinion given by another Bench of two Judges at about the same time. The learned CHIEF JUSTICE has commented on various rulings. His personal reason for holding the view that he did is given in the following words:—"To hold otherwise might

(1) (1916) I.L.R., 44 Cal., 650.

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lead to unreasonable results, e.g., assume a case where the information to the police is followed up by a complaint of a similar nature and to the same effect in court, which after investigation by a Magistrate is discharged; the person who had been accused then applies to the court for sanction to prosecute the person who laid the complaint for making a false charge in court, and the court refuses such sanction. According to Mr. Gregory's argument, the person who had been accused can then proceed, without any sanction against the prosecutor, alleging that he made a false charge to the police in the thana, relying on the same allegations and the same facts which the Magistrate has already investigated and as to which he had refused his sanction. Such a construction would be most unreasonable and, in my judgment, is not warranted by the language of the statute." It may be pointed out with all respect that in such a case, at all events, a prosecution under section 182 would be possible, and if such conflict between the court and the police is permitted there is no reason why further conflict should not be permitted as to prosecution under section 211. A Bench of this Court held definitely in *Emperor v. Kashi Ram* (1) that an offence under section 211 was complete when the charge was made, that is, when a particular person was charged before the police. The mere fact that subsequent proceedings in court are taken either against the person originally charged or against somebody else cannot affect what was done when the original charge was made, if it was a charge. In that case reference was made to a Bench of two Judges by Boys, J. That learned Judge disagreed with the view that a false report or a false charge made outside court, that is an offence under section 211 of the Indian Penal Code committed outside the court, must be held to have been committed in relation to a pro-

(1) (1924) I.L.R., 46 All., 906.

ceeding in a court if subsequently the case came into court. He found it quite impossible to hold that an offence is committed in relation to a proceeding when in fact there has been no proceeding and to hold it to be in relation to the proceeding in a court retrospectively because subsequently some proceedings did go into court. My attention was drawn to a subsequent single Judge case of this Court, *Ghaslwan Singh v. Emperor* (1). The facts of that case are different. The learned Judge himself pointed out that the case before him was distinguishable from the case of *Emperor v. Kashi Ram* (2), because in the case before him the false charge was made in court prior to any mention of such a charge to the Sub-Inspector. In my opinion the offence, if any, committed by Prag Datt was complete before he went to court with his complaint, and therefore it could not be said that the offence was committed in, or in relation to, any proceeding in any court. Sanction of the court under section 195(b) of the Code of Criminal Procedure was, therefore, not necessary.

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The next question is whether the Magistrate had the power to take cognizance under section 190 on a report by a police officer. The Superintendent of Police who complained did not take action under section 195(1). The police officer can make a report in writing of facts relating to a non-cognizable offence also, and on such report the Magistrate can take cognizance of the offence. Under section 190(b) cognizance may be taken of an offence upon a report in writing of such facts made by any police officer. In the case of *The Public Prosecutor v. Ratnavelu Chetty* (3) it was held by a Full Bench that by virtue of section 190(1)(b) and 200(aa) of the Code of Criminal Procedure, Magistrates mentioned in section 190 are entitled to take cognizance of even non-

(1) (1926) 24 A.L.J., 816.

(2) (1924) I.L.R., 46 All., 906.

(3) (1926) I.L.R., 49 Mad., 525.

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cognizable offences upon a report made in writing by a police officer without examining the officer upon oath.

Mr. Mathur or his successor has, therefore, jurisdiction to continue the proceedings against Prag Datt. I dismiss this application for revision.

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### APPELLATE CIVIL.

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*Before Mr. Justice Kendall and Mr. Justice Niamat-ullah.*

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July, 25.

TOSHANPAL SINGH AND OTHERS (DEFENDANTS) v. THE DISTRICT JUDGE OF AGRA AND OTHERS (PLAINTIFFS).\*

*Hindu law—Son's liability for father's debts—Immoral origin of debt—Misappropriation by father amounting only to breach of civil duty as agent—Criminality not established.*

The secretary of a school committee, having obtained the sanction of the committee, drew cheques on the School Building Fund for the construction of a building which he undertook to get built. There was nothing to show that he had any dishonest purpose in the beginning. Later on, he got into difficulties and dishonestly drew cheques on the General Fund of the School in an irregular way and by misleading the president and members of the committee as to the position of affairs, but it could not be found from the facts whether he was guilty of a criminal offence. He submitted certain accounts of the expenditure on the building, and acknowledged his liability to account for the unspent balance and, shortly after, died. The accounts were found to be unreliable incomplete and utterly inadequate. In a suit by the school committee against the sons, *Held* that the sons were liable, to the extent of the father's assets and the joint family property, for the excess of the amount drawn by the father over that of the value of the building.

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\*First Appeal No. 419 of 1925, from a decree of Shamsul Hasan, Additional Subordinate Judge of Agra, dated the 14th of August, 1925.



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A Hindu son is not bound to pay his father's debt if the liability arises directly from a criminal act, i.e., an act for which the father might or might not have been successfully prosecuted but which the evidence on the record is sufficient to prove to have been criminal. If, however, there is a civil liability, and subsequently the transaction becomes a criminal one, the son is bound to meet the civil liability to the extent of the family property, and the son's liability is in no way altered by the subsequent criminal act. Where the obligation itself is not infected with criminality and it is possible to separate the civil liability from the subsequent crime, the civil liability itself is not so infected.

THE facts of the case are fully set forth in the judgement of the Court.

Sir *Tej Bahadur Sapru*, Maulvi *Iqbal Ahmad* and Mr. *B. Malik*, for the appellants.

Mr. *B. E. O'Connor* and Dr. *Kailas Nath Katju*, for the respondents.

KENDALL and NIAMAT-ULLAH, JJ.:—This is an appeal from a decree and order of the Additional Subordinate Judge of Agra in favour of the plaintiffs respondents. The plaintiffs respondents are the members of the Committee of Management of the Balwant Rajput High School, Agra, and the defendants are the three sons of the late Thakur Dhyan Pal Singh who was secretary of that Committee. The circumstances that led up to the suit were briefly these. In 1915 the Government made a grant of Rs. 90,000 to the Committee to be expended on the school, on condition that the money should be placed in deposit with the Bank of Bengal and should not be utilized till schemes had been prepared (after consultation between the Managing Committee of the school and Government) to which the Committee and Government should have assented. The work was held up during the war, but on the 16th of October, 1920, Dhyan Pal Singh the secretary of the Committee represented to them that Rs. 60,000 of this grant had



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been invested in the three years War Loan, the period of which had expired, and that he had invested Rs. 50,000 in fixed deposit with the Bank of Bengal at 4 per cent. per annum and Rs. 10,000 in current account. He asked for the formal sanction of the Committee to this arrangement and further he asked for permission to operate on the account and to draw the money when necessary to meet the expenses of the brick kiln and the acquisition of other building materials. This was sanctioned by the Committee. It may be mentioned that Dhyan Pal Singh had drawn on the account before the sanction of the Committee was obtained and between the 23rd of August, 1920, and the 25th of October, 1921, he drew in all by various cheques Rs. 60,685. On the 13th of May, 1922, he represented to the Committee that the estimate for the proposed alterations and additions to the school building was about Rs. 78,000 according to the current public works rate and that he could get the entire thing done at a cost of Rs. 60,000 if the Committee authorized him to do it. He further represented that the Committee had in hand the sum of Rs. 70,000. The Committee passed a resolution authorizing him to put in hand the alterations subject to some modifications proposed by the executive engineer, which Dhyan Pal Singh himself had put forward, on condition that the total amount expended should not exceed Rs. 60,000.

From the 15th of May, 1922, to the 30th of January, 1923, Dhyan Pal Singh got the President of the Committee to countersign cheques for sums amounting in all to Rs. 21,597-3-2. It may be observed that there had been changes in the person of the President of the Committee during these proceedings, Mr. T. K. Johnston, Mr. J. R. W. Bennett and Dr. E. Bennet in turn assuming that office *ex officio* as District Judges of Agra. On the 7th of November, 1922, Dhyan Pal Singh

asked Dr. E. Bennet to countersign a cheque for Rs. 2,000. This was the first occasion on which Dr. Bennet had had anything to do with the matter. He asked Dhyan Pal Singh for vouchers and Dhyan Pal Singh replied that he had not so far been required to submit any but that he would now submit accounts. Accounts of some kind were after some considerable delay submitted, purporting to show that a sum of roughly Rs. 50,000 had been spent on the building. Before the matter was cleared up Dhyan Pal Singh died on the 30th of May, 1923. Meanwhile several matters had been arousing the suspicions of Dr. Bennet, who happened to be away from Agra when Dhyan Pal Singh died, and on his return finding that no cash balance had been left by Dhyan Pal Singh and that the large sums which that gentleman had drawn had not been properly accounted for, he applied for an official audit of Dhyan Pal Singh's accounts and as a result of that audit the present suit was filed by the Committee on the 29th of May, 1925. No allegation was made against Dhyan Pal Singh's sons personally, but it was prayed that they should be made to pay a sum of Rs. 86,863-4-2, or whatever might be found due, "from the property left by Thakur Dhyan Pal Singh and also out of the joint family property in their hands." The Subordinate Judge, after appointing an expert to value the work done, found Dhyan Pal Singh's accounts untrustworthy, decided that a sum of Rs. 48,143-1-2 was due, and he gave a decree for this amount without past interest.

The Subordinate Judge has calculated that this sum of Rs. 48,143-1-2 represented the balance which Dhyan Pal Singh had not accounted for, by deducting the value of the buildings (as calculated by Mr. Daly the expert) viz., Rs. 35,454-2-0 from the total sums which Dhyan Pal Singh had realized from the Committee on account

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of the building, which according to the Subordinate Judge came to Rs. 83,597-3-2.

The plaint states that the cause of action arose in August, 1920, when Dhyan Pal Singh began making improper use of the Government grant, but there is no mention in it of criminal misappropriation or breach of trust. The notice issued to Dhyan Pal Singh's sons, the present defendants, on February the 19th, 1924, (exhibit B) was to the effect that Dhyan Pal Singh "committed breach of trust of sums of money as detailed", etc., but did not suggest that there had been a criminal breach of trust. The defendants in their written statement did not admit that Dhyan Pal Singh had misappropriated any money or that he had committed any criminal breach of trust. They did not positively deny either that he had misappropriated money or that he had committed criminal breach of trust. Neither allegation had been definitely made, it will be observed, in the plaint itself and the plaintiff's case at that stage apparently was that Dhyan Pal Singh had been acting as the agent of the Committee, had made improper use of the Government grant and was liable to account for the whole of the Government grant to the Committee. \* \* \* Both in the final stages of the suit in the court below and in argument before us the defence has been based on two alternative and inconsistent theories; (1) that Dhyan Pal Singh had satisfactorily accounted for the whole sum for which he was responsible and (2) that he had committed criminal breach of trust or criminal misappropriation or some crime and that the sons could not be made liable for a debt that was tainted with immorality.

It is argued that although it is a pious obligation of the sons to discharge their father's debts it is by no means part of their pious obligation to protect his memory against the allegation of a crime. In fact it has been

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vehemently argued on behalf of the sons of Dhyan Pal Singh that the evidence discloses that Dhyan Pal Singh acted dishonestly throughout and would have been convicted in a criminal court. As the defendants appellants took their stand from the beginning on their alleged ignorance of the proceedings of their father, it was, we consider, open to them to base their defence in the alternative on these irreconcilable pleas.

The conclusion arrived at in regard to the first part of the defence by the learned Subordinate Judge was, as we have already remarked, that Dhyan Pal Singh's accounts were untrustworthy, incomplete and utterly insufficient to dispose of the large sums for which he had made himself responsible to the Committee. \* \* \* \* The final conclusion of the Judge was that there was not evidence sufficient to prove a charge of criminal breach of trust against Dhyan Pal Singh, but that there was a balance of money due by him to the Committee which he was bound to account for and the sons must be held to be liable to discharge it.

\* \* \* \* \*

The exact nature of the debts that must be held to be *avyavaharika* has given some difficulty to the various High Courts in India but the necessity for making a pronouncement on the subject has never, we believe, arisen in an appeal before the Privy Council. Their Lordships have, in several cases in which this precise issue did not arise, referred to debts which were incurred for an immoral or an illegal purpose, and in one or two passages to debts which were "tainted with immorality." But there is nothing in any of their pronouncements, so far as we know, to show that a debt which is incurred by means of a crime is to be distinguished from a debt which has been incurred in order to spend the money on an immoral object. The difference between these two kinds of debts is obvious on the face of it. But there is authority both in the commentators on Hindu law and in

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the decisions of the courts in India for holding that debts of both kinds are to be considered to be debts which a son is under no pious obligation to discharge on behalf of his father. "In the view of Hindu lawyers a debt is not merely an obligation but a sin, the consequences of which follow the debtor into the next world" (Mayne's Hindu Law, paragraph 302). The duty of relieving a debtor from the evil consequences of this sin falls on the male descendants and it is for this reason that there is a moral and religious obligation on the son to pay his father's debt. But Mayne remarks that the obligation does not arise in two cases, (1) when the debt is of an immoral character and (2) when it is of a ready money character; and the instances of immoral debts given by that learned commentator are sums due for spirituous liquor, for losses at play, for promises made without consideration or under the influence of lust or wrath, or sums for which he (the father) was a surety, or a fine or a toll or the balance of either and generally any debt for a cause repugnant to good morals. There is great diversity of opinion among the commentators in regard to the descriptions of debts by which the son is not bound, a diversity which, as Mr. Justice MUKERJI has remarked, has been faithfully reproduced in the decisions of the courts. But the early commentators appear to have been unanimous in holding that a fine or a toll or the balance of either is included in such debts. The payment of a fine is a penalty and although it is a penalty for an immoral act, the payment itself is not immoral and it is no doubt for this reason that the courts in India have been practically unanimous in holding that a debt arising out of a criminal transaction is not binding on the son.

The Allahabad High Court, in 1884, in the case of *Mahabir Prasad v. Basdeo Singh* (1), held that where a father had embezzled money and the debt had arisen on account of that embezzlement it would not be binding

(1) (1884) I.L.R., 6 All., 234.

on the son. In this case the embezzlement was clearly established. In 1906 in the case of *Jai Kumar v. Gauri Nath* (1) the circumstances were such as to suggest an embezzlement, but the father executed a promissory note, to which his son also attached his name, for the payment of the sum for which he was responsible. In this case the debt was held to be binding on the son, but the issue argued was whether the promissory note had been executed in order to stifle a prosecution and as it was not proved to have been executed for that purpose it was held that the debt could not be considered to be immoral because the promote was executed as security for a just claim. In view of the distinction that has been made between a criminal liability and a civil obligation it is worth noticing that in this case the civil liability arose after the transaction which was said to amount to an embezzlement. In 1916, in the case of *Niddha Lal v. The Collector of Bulandshahr* (2), an agent who had realized Rs. 4,000 on account of his principal misappropriated it. The exact circumstances of that case are not before us but it was held that the son would be liable for repayment of the amount because it was not exactly a case of criminal misappropriation. If it had been definitely proved that there had been an embezzlement or that the amount had been taken to avoid a criminal prosecution the decision might have been different. In 1924, in the case of *Chandrika Ram v. Narain Prasad* (3), it was held that the damages on account of trees which had been wrongfully cut by the father constituted a debt binding on the son because it was not an illegal or immoral debt in spite of the fact that the father had done wrong in cutting the trees. The learned Judges who decided this case differentiated it from the case of *Durbar Khachar v. Khachar Harsur* (4), in which the facts were somewhat similar, because in the case before

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(1) (1906) I.L.R., 28 All., 718.

(2) (1916) 14 A.L.J., 610.

(3) (1924) I.L.R., 46 All., 617.

(4) (1908) I.L.R., 32 Bom., 345.

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them the family had benefited by the tortuous act of the father. In 1925 it was held in the case of *Jagannath Prasad v. Jugal Kishore* (1) that where criminal misappropriation by the father had been admitted in his pleading by the applicant who claimed to bind the son, the debt was not binding, because on the admission of the applicant the debt was infected with an element of criminality. The father had as a matter of fact been acquitted by the criminal court. From these decisions the principle may be deduced that where a crime is definitely proved against the father and the debt arises from that transaction, it would not be binding on the sons. Where the question whether there was an actual crime or not is doubtful the court was reluctant to hold that an element of criminality existed, even where there was considerable evidence to prove it.

In Madras the line has perhaps been more clearly drawn between a criminal act and a civil liability. In the case of *Natasayyan v. Ponnusami* (2), where the father had dishonestly retained money due to another person, though he had not been convicted of a crime, it was held that as he had been guilty of a breach of a civil obligation the sons must be bound; whereas in the case of *McDowell and Company Ltd. v. Ragava Chetty* (3), where the evidence showed that the father had been guilty of criminal misappropriation though he had not been convicted by a criminal court, the sons were not liable. In the later cases of *Kanemar Venkappayya v. Krishna Chariya* (4), *Erasala Gurunatham v. Addepally Raghavalu* (5) and *Venkatacharyulu v. Mohana Panda* (6) the same reasoning appears to have been followed. Where the father had been convicted of a crime or where the evidence clearly showed that he had been guilty of criminal misconduct the sons were not bound, but where

(1) (1925) I.L.R., 48 All., 9.

(3) (1903) I.L.R., 27 Mad., 71.

(5) (1908) I.L.R., 31 Mad., 472.

(2) (1892) I.L.R., 16 Mad., 99.

(4) (1907) I.L.R., 31 Mad., 161.

(6) (1920) I.L.R., 44 Mad., 214.



the evidence was only sufficient to show a civil obligation the sons were bound. In Bombay in the case of *Durbar Khachar v. Khachar Harsur* (1), where the father had been guilty not of a criminal act at all but of an act involving him in civil damages, the son was held to be not liable, but the *ratio decidendi* appears to have been that the sons were not benefited by the tortuous act. If the sons had been benefited it would apparently have been held, as it was in the case of *Chandrika Ram v. Narain Prasad* (2), that the sons were liable. In the case of *Hanmant Kashinath v. Ganesh Annaji* (3) the father as trustee committed a breach of civil duty and it was held that the debt was not immoral and was binding on the son.

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Mr. Justice MOOKERJEE in the case of *Chhakauri Mahton v. Ganga Prasad* (4) reviews the case-law on the subject and suggests that the distinguishing line must be drawn between a criminal offence and a breach of civil duty and he remarks that where the taking of the money is not in itself a criminal offence, a subsequent misappropriation by the father cannot discharge the son from liability. The learned Judge quotes with approval a passage from the case of *Natasayyan v. Ponnusami* (5) to the effect that the son is not bound to do anything to relieve the father from the consequence of his own vicious indulgences, but he is surely bound to do that which the father himself would do to discharge a civil obligation if it were possible.

We think that we may safely derive the following propositions from the case law. If the liability arises directly from a criminal act, i.e., an act for which the father may or may not have been successfully prosecuted, but which the evidence on the record is sufficient to prove to have been criminal, the son is not bound. On this all

(1) (1908) I.L.R., 32 Bom., 348. (2) (1924) I.L.R., 46 All., 617.  
(3) (1918) I.L.R., 43 Bom., 612. (4) (1911) I.L.R., 39 Cal., 862.  
(5) (1892) I.L.R., 16 Mad., 99.



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courts are agreed. Secondly, if there is a civil liability and subsequently the transaction becomes a criminal one, the son is bound to meet the civil liability to the extent of the family property, but he is not concerned with the criminal matter. This is a more doubtful proposition and the decisions of the courts are not unanimous. But we think that it may be supported by reference to the nature of the religious obligation which arose potentially as soon as the civil liability occurred. If there had been no crime the son would undoubtedly have been responsible on account of the civil liability. The subsequent crime may involve the father in further difficulties in the next world, but these are beyond the control of the son and they are, so far as we know, distinct from the penalties arising from a civil obligation. If this be so, the son's obligation to discharge the civil liability is in no way altered by the subsequent crime. In coming to this conclusion we do not think that we are in any way dissenting from the judgement in the case of *Jagannath Prasad v. Jugal Kishore* (1), which is the latest pronouncement of this Court on the subject. There the obligation itself was held to be infected with criminality. But where it is possible to separate the civil liabilities from a criminal action we consider that the civil liability itself is not so infected.

We have already given a summary account of Dhyan Pal Singh's transactions so far as they appear from the evidence on the record. Much that is now obscure might have been made clear if Dhyan Pal Singh had lived and had been able to explain what he did and what his motives were. [The judgement then proceeded to consider the evidence in detail, and thereafter continued as follows.]

The final result of all these objections (to the valuation of the buildings according to Mr. Daly, the expert) is that we would add Rs. 2,392 for extra bricks,

(1) (1925) I.L.R., 48 All. 9.

and Rs. 2,757-13-0 in respect of work rejected by Mr. Daly as defective, to the Rs. 35,454-2-0 at which Mr. Daly has valued the buildings provided by Dhyan Pal Singh. The practical effect of this would be that Dhyan Pal Singh is shown to have accounted for Rs. 40,603-15-0 of the money entrusted to him.

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To return to the legal aspect of the case and the conduct of Dhyan Pal Singh, we think it is clear that when he applied for and obtained the sanction of the Committee to draw cheques up to the value of Rs. 60,000 in order to provide bricks and other materials for the building, there is nothing to show that he had any dishonest purpose. He assumed the character of an agent to the Committee and from that date, that is to say from the 16th of October, 1920, he became responsible to account to them for this amount. He has failed to do so. It appears to be not unlikely that owing to slack supervision very large sums of money were wasted, but we can find no clear evidence of any deception until the date when, having exhausted Rs. 60,000, he began to draw on the ordinary school account, for which he had to obtain the countersignature of the President of the Committee. We think that there can be no doubt that he intentionally misled Mr. J. R. W. Bennett, and later on Dr. Bennet, in regard to the position. He had spent all the money with which he had been entrusted, but he still had to go on with the building, and he raised the money in what was most unquestionably an irregular way. It would be difficult to say, however, that in so doing he committed a crime. The argument addressed to us on behalf of the appellants, to show that his actions were "infected with criminality", was directed to proving that from the beginning he had acted in a dishonest way. This, as we have held, is not proved and is not even likely. If he acted at first in perfect good faith, as we believe to be the case, and subsequently got

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into difficulties and dishonestly drew on the ordinary school accounts, he may or may not have been guilty of some criminal offence. It is not proved that he was, because the position is not clear, and we do not know how he was able to draw on this ordinary school account or what his ultimate intentions were. It is at any rate clear that he acknowledged liability for about Rs. 30,000 when he wrote in March, 1923, to Radhey Lal, and that he knew then that he would have to account for this amount. We can only say that this part of his conduct was suspicious and was probably dishonest, but in the view that we have taken of the law it does not affect the sons' liability in regard to the civil obligation which he undertook on the 10th of October, 1920. The position is somewhat complicated by the fact that in drawing these later cheques after the Rs. 60,000 Dhyani Pal Singh was drawing money with which he had, so far as we know, not been specifically entrusted by the Committee, but we do not think it is necessary to insist on the distinction. He realized the money under colour of the authority given him by the Committee, and he admitted his responsibility to account for it.

The final result is that we modify the decree and order of the lower court to this extent that the amount of the decree is reduced by a sum of Rs. 5,149-13-0 and will, therefore, be Rs. 42,993-4-2. For the rest the appeal is dismissed and as the appellants have substantially failed in all their grounds of appeal, we direct that they pay the costs of this appeal.

## REVISIONAL CIVIL.

Before Mr. Justice Mukerji.

SECRETARY OF STATE FOR INDIA IN COUNCIL  
(DEFENDANT) v. MURLI MANOHAR (PLAINTIFF).\*

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*Railway—Travelling by longer but quicker route—Excess fare  
—Indian Railways Coaching Tariff, Rules 63, 64.*

A passenger after purchasing a ticket from Agra to Moradabad via Aligarh and Chandausi discovered that if he travelled beyond Aligarh and via Ghaziabad he would reach his destination more quickly than by the route indicated on the ticket, although he would be travelling by a longer route. He did travel accordingly and on arrival at Moradabad he was made to pay excess fare. On suit for refund, *Held* that rule 64 of the Indian Railways Coaching Tariff applies to a passenger who is found travelling, either intentionally or by mistake, by a route other than that indicated on the ticket and not to a passenger who has arrived at his destination, and that the case was governed by rule 63 and the excess fare was justified.

THE facts of the case appear from the judgement of the Court.

Pandit *Uma Shankar Bajpai*, for the applicant.

Munshi *Kamla Kant Verma*, for the opposite party.

MUKERJI, J. :—This is an application in revision by the Secretary of State for India in Council against the decision of a learned Judge of the small causes court at Moradabad.

It appears that the respondent, Mr. Murli Manohar, bought a ticket from Agra to Moradabad. He paid for the route, a portion of which branched off from Aligarh and passed through Chandausi. He however discovered, later on, that if he travelled beyond Aligarh and via

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\*Civil Revision No. 123 of 1928.

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Ghaziabad he would arrive at his destination more quickly than by the proposed route although he would be travelling by a longer route. He thought that he might travel by the longer route. He did travel accordingly and when he arrived at Moradabad, he was made to pay an excess fare. He thereupon brought the suit out of which this revision has arisen, to recover from the railway administration the amount of the excess fare. The suit succeeded in the court below and hence the revision.

The court below held that rule No. 64 of the Coaching Tariff permitted the respondent to travel by the route he chose. In this Court, his learned counsel has relied on a further rule to be found in the "Time-table" issued by the East Indian Railway and printed at page 175 as clause (r) to rule 1, under the heading "Travelling by alternative routes." On behalf of the applicant, reliance is placed on rule 63 of the Coaching Tariff which is also to be found at page 119 of the aforesaid Time-table as clause (f) to rule 2, headed "Booking of Passengers." Rule 64 is described as a rule relating to "Passengers found travelling by routes other than the booked route" and runs as follows:—

"When a passenger is found travelling on a route by which he is not booked, he may travel to destination by the shortest or quickest route, whichever he prefers, without any additional charge, fare or penalty being levied. If, however, a passenger refuses to travel by the shortest or quickest route, he will be charged the fare for the route by which he travels."

A bare reading of this rule will show that this rule applies only when a passenger is in transit. It has nothing to do with a passenger who has arrived at his destination. This rule is meant to apply to a case in which

a passenger, either deliberately or by mistake, has selected a route by which he is not permitted to travel by the ticket. In those circumstances, the rule lays down that the railway administration will make him travel by the shortest or the quickest route, whichever he prefers. This rule cannot, by any possible interpretation, be made applicable to a case in which the journey has come to an end.

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As regards the clause (r) to be found at page 175 of the Time-table, this too has no application, for it does not permit a passenger to travel beyond the place which he has to reach. The illustration given clearly shows that the point, which he must not go beyond, would be a place on the same longitude as the place of his destination. In this case, Ghaziabad is situated to the west of the longitude which must pass through Moradabad and therefore the respondent must be taken to have travelled beyond Moradabad.

The two exceptions relied on by the respondent having failed him, it must follow that rule 63 governs the case. Even if rule 63 did not exist, it must be taken that the route one travels by must be paid for. The result is that the railway administration were perfectly justified in exacting the excess fare that they did realise and the suit was not justified. I allow the application with costs and direct that the suit do stand dismissed with costs.

Before Mr. Justice Sulaiman, Acting Chief Justice.

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KIRAN KOOMAR BANERJI (APPLICANT) v. BAIJ NATH  
(OPPOSITE PARTY).\*

*Act No. IX of 1887 (Provincial Small Cause Courts Act), section 17—Deposit of security within limitation—Accepted by court—Security subsequently found to be ineffective—Fixed deposit receipt deposited as security without hypothecation bond.*

In execution of an *ex parte* decree passed by a small cause court a fixed deposit, belonging to the judgment-debtor, in a certain Bank was attached. The judgment-debtor applied for setting aside of the *ex parte* decree and stated that the fixed deposit which had been attached should be taken as security required by section 17 of the Provincial Small Cause Courts Act. Subsequently, and within the period of limitation for making the application, he deposited his fixed deposit receipt in court, but without any security bond hypothecating its amount, and on the same day the court accepted it as sufficient. The decree-holder objected that no sufficient security had been deposited.

*Held*, that no adequate security had been furnished; but inasmuch as the security was accepted by the court and by reason of that acceptance the judgment-debtor was misled and was deprived of an opportunity to make good the security before the limitation expired, it should not be said in this case that he had failed to furnish security "to the satisfaction of the court," and he should be given a fresh opportunity to deposit adequate security.

*Semble*, the mere fact that security is not deposited along with the application for setting aside the *ex parte* decree is not fatal to the application, if the security is deposited at any time before the expiry of the limitation for the application itself.

THE facts of the case are sufficiently set forth in the judgement of the Court.

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\*Civil Revision No. 173 of 1928.

Babu Sailanath Mukerji, for the applicant.

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Munshi Narain Prasad Asthana, for the opposite party.

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SULAIMAN, A. C. J. :—This is an application in v. PAIJ NATH. revision from an order dismissing an application for setting aside an *ex parte* decree. The decree was passed on the 9th of January, 1928, and it was put in execution and a fixed deposit belonging to the applicant lying in a Bank was attached. Notice was sent to the Bank and to the applicant who thereupon filed an application in the court on the 5th of March, 1928, that he for the first time came to know of the suit on the 28th of February, 1928. In his application he stated that his fixed deposit which had been attached under an order of the court should be taken as security required by section 17 of the Provincial Small Cause Courts Act. On the 14th of March, 1928, the applicant deposited the fixed deposit receipt in court but he omitted to file any security bond hypothecating its amount. In its order of the 14th of March, 1928, the court accepted the attached amount as sufficient security. The order, however, was behind the back of the decree-holder. It is to be noted that when the court accepted the amount as sufficient security, 30 days from the date alleged to be the date on which the applicant first had knowledge had not expired. Ultimately, when objection was raised by the decree-holder the court held that no sufficient security within the meaning of section 17 had been deposited along with the application. The application was accordingly dismissed.

No doubt the view which has prevailed in this Court is that the provisions of section 17 are imperative and the requirement to deposit security at the time of presenting the application is mandatory: *Jagan Nath v. Chet Ram* (1). If, however, the security is deposited

(1) (1906) I.L.R., 28 All., 70.



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before limitation has expired the application might very well be treated as having been validly made on the date when the security was deposited. In such a case after the deposit of the security the application may well be entertained by the court: *Jeun Muchi v. Budhiram Muchi* (1). In the present case, however, no sufficient security was as a matter of fact deposited within the time, though the fixed deposit receipt tendered by the applicant was accepted by the court as a sufficient security. In my opinion it is not sufficient for an applicant to state that money which stands attached should be treated as security. For such an attached amount he has not really furnished any sufficient security for the decree-holder. No lien or bar is created over the amount which would be paramount as against other creditors who may like to attach the amount. Such an attached amount would always be liable to be seized upon by other creditors claiming rateable distribution, the result being that the security is liable to dwindle if such other claimants come forward. Similarly, a mere deposit of the fixed deposit receipt, which is not transferable, did not amount to an adequate security furnished by the applicant. The court could not have realized the amount of the fixed deposit receipt without the consent of the applicant. The applicant did not, therefore, place the amount at the full disposal of the court as the case would have been if cash had been deposited. I therefore agree with the court below that sufficient security was not as a matter of fact deposited within limitation.

At the same time I cannot ignore the circumstance that the court had as a matter of fact accepted as sufficient security the fixed deposit receipt coupled with the applicant's statement that the attached money should be treated as such. On that date the time, according to the allegation in the application, had not expired.

(1) (1904) I.L.R., 32 Cal., 339.

Had the court rejected the security there and then, it would have been possible for the applicant to make it good in cash. The acceptance undoubtedly misled the applicant, and he was by virtue of that acceptance deprived of an opportunity to make good the amount before the limitation expired. I therefore think that in this case it cannot be said that the applicant failed to furnish the security "to the satisfaction of the court." The security was really insufficient, but the court was satisfied that it was adequate.

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In the case of *Azmat-ullah Khan v. Ahmad Ali* (1) a mistake had been made by the applicant as regards the amount for which he was to furnish security. The amount for which the property covered by the security bond was hypothecated was slightly less than the amount of the decree, though the property hypothecated was worth more. STUART, J., thought that a mistake of that kind was not fatal, when the applicant did in fact deposit the full amount in cash later. In the present case if the court had rejected the security on the ground that it was no security at all the applicant might very well have deposited the amount in cash. It will be injustice to allow the applicant to suffer on account of an error committed by the court. On condition of the applicant depositing fresh security for the full amount of the decree within 30 days from this date, I would in the special circumstances of the case allow this revision, and setting aside the order of the court below restore the application and direct that it may be disposed of according to law. The parties will bear their own costs. If fresh security is not deposited within the time allowed the order of the court below will stand, and the respondent will get the costs of this revision.

(1) (1925) I.L.R., 47 All., 728.

## MISCELLANEOUS CIVIL.

Before Mr. Justice Mukerji.

1928  
August, 3.

IN THE MATTER OF THE SARASWATI TRADING CORPORATION, LIMITED.\*

Act No. VII of 1913 (*Indian Companies Act*), sections 207, 215—*Voluntary liquidation—Power of enforcing a call by a suit.*

A liquidator in a voluntary liquidation can enforce a call either by means of an application to the court under section 215 of the Indian Companies Act or by means of a suit. The power to bring such a suit is not taken away by section 215.

THE facts of the case fully appear from the judgment of the Court.

Munshi Shiva Prasad Sinha, for the applicant.

MUKERJI, J.:—Pandit Subhakaran Upadhiya, contributory No. 69, has raised two objections to his being called upon to contribute towards liquidation of the company. The first is that he was sued by a former liquidator in the year 1918 in the city Munsif's court at Jaunpur and he was successful. In the circumstances, the present liquidators have no right to call on him to make the same payment through these proceedings. The second objection is that the present claim is barred by limitation.

It has been contended on behalf of the liquidators that the city Munsif had no jurisdiction to entertain the suit and the decree that was made in the suit in 1918 does not operate as *res judicata*. On the question of limitation it is urged that these proceedings not being a suit, the Limitation Act has no application.

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\*Miscellaneous Case No. 215 of 1921.

It appears to me that the powers of a voluntary liquidator are defined in section 207 of the Indian Companies Act. On the question of settlement of list of contributories clause (5) of section 207 is applicable and it runs as follows :—"The liquidator may exercise the powers of the court under this Act of settling a list of contributories and of making calls, etc."

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The question is, how is a call to be enforced by the liquidator? One method of enforcing such call is furnished by section 215 of the Indian Companies Act, which says that where a company is being wound up voluntarily the liquidator may apply to the court to determine any question arising in the winding up or to exercise, in respect of enforcing calls, all or any of the powers which the court might exercise if the company were being wound up by the court. In the present case the company is not being wound up by the court. It was a voluntary liquidation till the 1st of July, 1921, when an order was passed by this Court bringing the liquidation under its supervision. In 1918, therefore, it was open to the liquidator to make an application under section 215 of the Indian Companies Act to enforce a call. But the question is, was that the only method in which he could enforce the call or could he enforce the call by a suit? The language of section 215 does not indicate that this is the only method open to the voluntary liquidator. The fact that he has been empowered to seek the assistance of the High Court does not mean and cannot mean that ordinary powers that he may have under the law are taken away from him. A liability having arisen when a list of contributories has been prepared, that liability must be open to enforcement in the ordinary way, unless there is some rule of law which prevents the ordinary way from being availed of.

English cases based on older enactments are no sure guide in these circumstances, and I do not propose to rely

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on the case of *Brighton Arcade Company Ltd., v. Dowling* (1), though it supports my view. In my opinion the reading of section 215 leaves little room to doubt the voluntary liquidator's power to enforce the calls by a suit.

Such being the case, the suit of 1918 was not incompetent and the suit was maintainable. The result is that the present petition must fail as against Pandit Subhkaran Upadhiya. The name of Pandit Subhkaran Upadhiya will be removed from the list of contributories and he will receive his costs from the liquidators. The question of limitation does not require determination. The costs paid by the liquidators may be recouped by them from the assets of the company.

### REVISIONAL CRIMINAL.

*Before Mr. Justice Dalal.*

EMPEROR *v.* NEUR AHIR.\*

1928  
August, 3.

*Criminal Procedure Code (as amended by Act No. XVIII of 1923), sections 109, 436—Discharge under section 119—Further inquiry by District Magistrate—Jurisdiction—“Offence.”*

A District Magistrate has no jurisdiction under section 436 of the Criminal Procedure Code (as amended by Act XVIII of 1923) to take up in revision, and order further inquiry into, the case of a person against whom proceedings under section 109 were taken and who was discharged under section 119. Such a person is not a “person accused of any offence” within the meaning of section 436. *Velu Tayi Ammal v. Chidambaravelu Pillai* (2) and *Emperor v. Roshan Singh* (3) followed. *King-Emperor v. Fyaz-ud-din* (4), not followed.

\*Criminal Revision No. 593 of 1928, from an order of H. H. Shaw, District Magistrate of Ghazipur, dated the 3rd of July, 1928.

(1) (1868) L.R., 3 C. P., 175. (2) (1909) I.L.R., 33 Mad., 85.  
(3) (1923) I.L.R., 46 All., 235. (4) (1901) I.L.R., 24 All., 148.

Munshi Kumuda Prasad, for the applicant.

The Crown was not represented.

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DALAL, J. :—One Neur Ahir was called upon by a Deputy Magistrate of Ghazipur under section 109 of the Code of Criminal Procedure to show cause why he should not be bound over under section 109 of the Code of Criminal Procedure to be of good behaviour for a certain period of time. After inquiry he was discharged under section 119 of the Code of Criminal Procedure. Subsequently the District Magistrate of Ghazipur took up the case in revision under section 436 of the same Code and directed further inquiry to be made in the case by another Deputy Magistrate. It is submitted here in revision that the District Magistrate had no jurisdiction to interfere. A District Magistrate is empowered to direct a subordinate Magistrate to make a further inquiry into the case of any person accused of an offence who has been discharged. It is argued here that Neur was not a person accused of an offence. In section 4(o) of the Criminal Procedure Code "offence" is defined as an act or omission made punishable by any law for the time being in force. The conduct of a person called upon to give security under part IV of the Criminal Procedure Code relating to the prevention of offences would consist of a number of acts or omissions and would not be described as one act or omission to come within the definition of "offence". The act or omission further has to be punishable by any law for the time being in force. The word "punishable" is not defined in section 4 of the Criminal Procedure Code, where however it is indicated that words and expressions used therein and defined in the Indian Penal Code, and not thereinbefore defined, shall be deemed to have the meanings respectively attributed to them by that Code. Referring to that Code for a definition of punishment, it appears that punishment is

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described in section 53 of the Indian Penal Code by an enumeration which, it may be taken, is considered exhaustive. The giving of security is not included in the list of punishments given in section 53.

This Court, in conflict with the opinion of some other High Courts, has held the opinion that under section 436 of the Criminal Procedure Code a District Magistrate had jurisdiction to revise the case of a person who had been called upon to give security and was discharged. *King-Emperor v. Fyaz-ud-din* (1) is one of a series of cases. In 1923, however, by Act No. XVIII of 1923 the provisions of section 436 of the Criminal Procedure Code have been amended and the words "any accused person" have been replaced by the words "any person accused of an offence." The editor of Sohoni's Criminal Procedure Code has not given it as his opinion that the law as it previously existed has been altered by the amendment. He has quoted conflicting authorities and made note of the disagreement between this Court and the Madras High Court. It appears, however, that when conflict of authority existed in 1923 the Legislature must have made the amendment with a view to removing the conflict and adopting one of the two conflicting views. For reasons given above I am of opinion that the view of law taken by the Madras High Court has been preferred: *Velu Tayi Ammal v. Chidambaravelu Pillai* (2). The learned CHIEF JUSTICE of this Court held the view in one case that the provisions of section 436 do not cover a discharge under section 119 of the Code of Criminal Procedure: *Emperor v. Roshan Singh* (3). It is true that in that case the law was not discussed, as the learned Government Pleader accepted the contention of the applicant in revision in that case. As, however, I am of the opinion that the law

(1) (1901) I.L.R., 24 All., 148.

(2) (1909) I.L.R., 33 Mad., 85.

(3) (1923) I.L.R., 46 All., 235.



has been altered to bring it in conformity with the view of the Madras High Court, that view should now be accepted by this Court. I direct that no further proceedings shall be taken against Neur Ahir and that the order of his discharge of the 11th June, 1928, be maintained.

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### FULL BENCH.

*Before Mr. Justice Boys, Mr. Justice Kendall and Mr. Justice King.*

RAM SARAN DAS (DEFENDANT) v. BHAGWAT PRASAD (PLAINTIFF) AND RAM SARUP (DEFENDANT).\*

1928

March, 2.

June, 12.

*Act (Local) No. XI of 1922 (Agra Pre-emption Act), sections 19, 20—Pre-emption—Vendee becoming co-sharer after suit and before decree—Defeatance of plaintiff's suit—Marginal notes to sections of Act—Authority thereof—Interpretation of statute.*

Under the provisions of section 19 of the Agra Pre-emption Act, 1922, a defendant vendee can, by obtaining a gift to himself of a share in the mahal subsequent to the institution of the suit and prior to the passing of the decree, defeat the plaintiff's right to a decree for pre-emption.

Section 20 of the Act is not concerned with the effect of the acquisition of interest subsequent to the date of the suit, but applies only to such acquisition before the institution of the suit.

Marginal notes to sections of an Act can be referred to for the purpose of interpretation if they can be regarded as inserted by, or under the authority of, or assented to by the legislature.

The marginal notes to the sections of the Agra Pre-emption Act, 1922, are to be regarded as inserted in the Act with the assent and authority of the Legislative Council, and can be referred to for the purpose of interpreting the sections.

\*Second Appeal No. 804 of 1926, from a decree of P. C. Plowden, Additional Judge of Meerut, dated the 2nd of March, 1926, confirming a decree of Ratan Lal, Munsif of Baghpat, dated the 21st of May, 1925.



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*Qudrat-un-nissa Bibi v. Abdul Rashid* (1), *Haji Sultan v. Masitu* (2), *Ram Khelawan v. Bankey Bihari* (3), *Deo Narain Singh v. Ajudhia Prasad* (4) and *Bhagwan Sahai v. Nanak Chand* (5), referred to. *Claydon v. Green* (6) and *Balraj Kunwar v. Jagatpal Singh* (7), distinguished.

THE facts of the case are fully set forth in the following referring order :—

*Referring Order.*

MUKERJI and SEN, JJ. :—The facts of the case are briefly as follows :—The defendant No. 2, Ram Sarup, sold what has been described as his “zamindari house,” situated in a certain village called Dhikana, to the defendant No. 1 on the 26th of March, 1924. On foot of an alleged custom of pre-emption the plaintiff, who is a co-sharer in the village, sued the defendant No. 1 for pre-emption. The suit was instituted on the 23rd of March, 1925. Pending the suit, on the 7th of April, 1925, the defendant No. 1, Ram Saran, obtained a gift from a certain co-sharer in the village with respect to a small interest in it. Having acquired this property, Ram Saran contended that he had become a co-sharer prior to the passing of the decree and was, therefore, in a position to defeat the plaintiff's suit. The defendant No. 1 raised some other grounds for defeating the plaintiff's suit but those grounds are not pressed before us.

The two courts below held that the gift in favour of Ram Saran should have been made prior to the institution of the suit, to enable him to defeat the plaintiff's right. The two courts below interpreted section 20 of the Pre-emption Act, which is admittedly applicable to the circumstances of the case, in the way indicated.

In this Court the learned counsel for the appellant has argued that the interpretation put by the courts below is contrary to the interpretation put in this Court in several cases, namely *Qudrat-un-nissa Bibi v. Abdul Rashid* (1), *Ram Khelawan v. Bankey Bihari* (3), *Deo Narain Singh v. Ajudhia Prasad* (4) and *Haji Sultan v. Masitu* (2).

(1) (1926) I.L.R., 48 All., 616.

(2) (1926) I.L.R., 48 All., 689.

(3) (1926) I.L.R., 49 All., 268.

(4) (1927) I.L.R., 49 All., 696.

(5) (1927) I.L.R., 49 All., 516.

(6) (1868) L.R., 3 C.P., 511.

(7) (1904) I.L.R., 26 All., 393.

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We find ourselves in some difficulty in accepting the interpretation put on section 20 in those cases. All of those cases were decided by Benches of two learned Judges of this Court and in the case of *Haji Sultan v. Masitu* (1), Mr. Justice Boys appears not to have been satisfied with the interpretation put in the case of *Qudrat-un-nissa Bibi v. Abdul Rashid* (2), though he did not feel it necessary to dissent expressly from the view of his colleague. We have considered the case of *Qudrat-un-nissa Bibi v. Abdul Rashid* (2) carefully, for that is the case which has been accepted as correct in the other cases without any comment or discussion.

As we think it desirable that the case should go before a larger Bench, it is not necessary for us to put our views at full length. We shall only indicate why we find difficulty in accepting the interpretation put on section 20 of the Agra Pre-emption Act.

Section 20 of the Agra Pre-emption Act is divided into two portions. If we read the two portions separately, they will stand as follows, even according to the view taken in the case of *Qudrat-un-nissa Bibi v. Abdul Rashid* (2): "(a) No suit for pre-emption shall lie where the purchaser has, prior to the institution of such suit, transferred the property in dispute to a person having a right of pre-emption equal or superior to that of the plaintiff;" (b) "No suit for pre-emption shall lie where the purchaser has acquired an indefeasible interest in the mahal, which, if existing at the date of the sale or foreclosure, would have barred the suit." Assuming that the expression "prior to the institution" to be found in clause (a) was inapplicable to clause (b), the latter will stand as it has been put above, without those words. SULAIMAN, J., was clearly of opinion that the words "prior to the institution of the suit" could not be carried into what has been put above as clause (b). We express no opinion on that point, at present. We accept that those words should be confined to clause (a). But even without those words clause (b) would indicate that the crucial date for acquisition of an interest by the defendant must be a date before the institution of the suit. Clause (b) starts with the words "No suit . . . shall lie." These words can only mean that where certain

(1) (1926) I.L.R., 48 All., 689.

(2) (1926) I.L.R., 48 All., 616.

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things have happened, the suit would not be maintainable at the date when the plaint is brought before the court. The words cannot be interpreted as meaning that, although a suit would be perfectly justified when it is instituted, it would be liable to be defeated at a later date on certain things happening. This would not be an interpretation of the language used by the legislature. The words, "has acquired," point to the same interpretation, viz. acquisition has occurred before the plaint is brought into the court.

As regards the argument that rulings of this Court, before the enforcement of the Pre-emption Act, laid down that a plaintiff's suit, though perfectly good at the date of the institution, was liable to be defeated if the defendant acquired an interest in the mahal before the passing of the decree, it is not right to conjecture that the legislature did not contemplate a departure from the existing law by enacting section 20. For, it was also undoubtedly the rule of law laid down in this Court that a plaintiff's right to pre-empt was liable to be defeated or modified if the transferee sold the property to a third person having an equal or superior right of pre-emption to the plaintiff, at any time before the passing of the decree by the court of first instance: See, for example, *Bhagwan Sahai v. Nanak Chand* (1). The legislature has clearly departed from this rule of law. We cannot, therefore, say that the legislature wanted to accept one part of the rule and was prepared to give up or dissent from the other part.

We think that when the language of a section is capable of clear interpretation, without the introduction of additional words or without looking into what was the state of the law before the enactment, it is not open to us either to introduce additional words or to look into the previous state of the law.

The interpretation which has found favour in the cases quoted above, beginning with the case of *Qudrat-un-nissa Bibi v. Abdul Rashid* (2), requires the addition of the words "any time before the decree" between the words "acquired" and "an" as put in clause (b) above, and entirely ignores the opening portion of the section, namely "no suit . . . shall

(1) (1927) I.L.R., 49 All., 516.

(2) (1926) I.L.R., 48 All., 616.

lie," and the word "has," in present perfect tense, before the word "acquired." "Has acquired" means, "the acquisition is complete at the date mentioned," viz. the date of the institution of the suit.

The Pre-emption Act was passed only a short time ago. The first case in which the interpretation, which we find difficult to accept, was declared was decided in 1926, and the other cases which followed it were decided either the same year or the next year. The period, therefore, is too short to induce us to accept the interpretation on the sole ground of the interpretation being of some standing.

We refer the case to the Hon'ble the CHIEF JUSTICE, for the formation of a larger Bench; and the question which we refer to that Bench is as follows:—"Whether on a true interpretation of sections 19 and 20 of the Agra Pre-emption Act of 1922, a defendant vendee can defeat the plaintiff's right of pre-emption, which undoubtedly existed at the date of the institution of the suit, by acquisition of an interest, equal or superior to the plaintiffs in the mahal, after the institution of the suit but prior to the passing of the decree by the first court."

Dr. N. C. Vaish, for the appellant.

Munshi Panna Lal, for the respondent.

Boys, J.:—The following question has been referred to the Full Bench:—

"Whether on a true interpretation of sections 19 and 20 of the Agra Pre-emption Act of 1922 the defendant vendee can defeat the plaintiff's right of pre-emption, which undoubtedly existed at the date of the institution of the suit, by acquisition of an interest equal or superior to the plaintiff's in the mahal after the institution of the suit but prior to the passing of the decree by the first court?"

The reference to section 19 in the question is inserted in manuscript after the referring order was typed.

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This subsequent insertion we note only because the discussion of the question in the referring order is confined to the effect of section 20 of the Act, and no opinion has been expressed in that referring order in regard to the effect of section 19. We have, however, manifestly to consider both sections.

*Boys, J.*

In the present case the facts are that Ram Sarup on the 26th of March, 1924, sold a zamindari house to the defendant Ram Saran Das, who at the time of the sale was not a co-sharer.

On the 25th of March, 1925, Bhagwat Prasad by virtue of his right as a co-sharer brought a suit for pre-emption against Ram Saran Das, the vendee, and Ram Sarup the vendor. On the 7th of April, 1925, that is subsequent to the filing of the suit, but prior to the decree, Ram Saran Das, the defendant vendee, obtained a gift of a share in the mahal. It will be noted that this suit was brought under the Agra Pre-emption Act of 1922, and one of the questions, in fact the main question, with which we are concerned is whether the Act altered the law as it is admitted to have previously existed.

Both courts decreed the plaintiff's suit, repelling the defendant's contention that he could defeat it because he had become a co-sharer before the decree by virtue of the gift to him.

The defendant has appealed and on his behalf it has been contended that by virtue of section 20 of the Act of 1922 a subsequent gift to him after the filing of the suit but before the decree defeated the plaintiff's right and the suit should have been dismissed. Reliance appears to have been placed on behalf of the defendant on section 20 throughout, and his counsel did not apparently intend to rely at all on section 19, until reference to that section was made by the Court at the hearing before us. This will no doubt also account for the fact that the applicability of section 19 is not discussed in

the referring order, and that mention of that section only finds subsequent place in the question referred. The explanation of this is probably to be found in the fact that section 20 was interpreted in a sense to some extent favourable to the defendant in *Qudrat-un-nissa Bibi v. Abdul Rashid* (1). No attention appears to have been directed to the fact that that case is also authority for the proposition that section 19 must also be interpreted in a sense favourable to the defendant, even if section 20 would not help.

As the case now is before us for judgment we have to consider the effect of both sections. It is admitted on all sides that according to the previously existing law a gift to the vendee, though subsequent to the date of suit, would, if prior to the decree, defeat the right of the plaintiff pre-emptor and his suit would have to be dismissed. That is how the law undoubtedly stood before the passing of the Act of 1922. A reference has been made in the referring order to the view expressed by me in *Haji Sultan v. Masitu* (2). In that judgment I referred to the fact that the *cursus curiae* in defendant's favour involved a departure from the ordinary principle that a plaintiff's right should be determined by the state of affairs existing at the date of suit. I said: "There is obviously something to be said in support of this departure from the ordinary rule of regarding the date of suit as the crucial date, but it is a dangerous departure. I think that its extension to further cases is one to which I should be very loath to assent without full consideration. These observations are only necessary because I want to guard against the suggestion that anything and everything that occurs subsequent to the date of a suit may similarly be taken into consideration. I agree with the order proposed." I have quoted this passage

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(1) (1926) I.L.R., 48 All., 616. (2) (1926) I.L.R., 48 All., 689.

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in full because the remarks are referred to in the referring order as throwing doubt on the *cursus curiae*. It is, however, apparent from the passage that I have quoted that though I disliked, and, I may add, would not have been a willing party to the establishment of such a *cursus curiae*, I acknowledged that it already existed and agreed to follow it. It is quite a different matter that we have got to consider. The case before the court in *Haji Sultan v. Masitu* (1) was a case prior to the Act of 1922, and we had not got to consider in that, nor did I consider in that, the effect of the new Act of 1922 which was not applicable to the case then before us, or the question whether that Act amended the law or codified it as already existing.

To turn now to the Act itself. The defendant relied, as I have said, on section 20. He contended that there was nothing to show that section 20 was intended to alter the law, and that it covered not only acquisitions prior to the suit but also acquisitions subsequent to the date of the suit. Section 20 reads, so far as is material for the present case :—"No suit for pre-emption shall lie where the purchaser . . . has acquired an indefeasible interest in the mahal which, if existing at the date of the sale or foreclosure, would have barred the suit." It was contended that because the words "prior to the institution of such suit" did not appear in the second portion of the section and did find place in the first portion subsequent to the word "has" where it first occurs, therefore it must be taken that the omission of those words in the second portion indicates that the second portion was intended to protect the vendee even though the interest he had acquired was acquired subsequent to the date of the suit. In *Qudrat-un-nissa Bibi v. Abdul Rashid* (2) the contention "that section 20 permits a defence only when prior to the institution

(1) (1926) I.L.R., 48 All., 689.

(2) (1926) I.L.R., 48 All., 616.



of the suit a purchaser has transferred property or has acquired an indefeasible interest in the mahal" was rejected. It is, however, in my opinion, manifest that the words "No suit for pre-emption shall lie" are sufficient and clear indication that judgment upon the rights of the parties must be passed on the basis of the facts existing at the date of the suit. That the section might, grammatically speaking, have been more happily worded is beyond doubt but it is equally beyond doubt that as worded it will only entitle the defendant to rely on an acquisition made prior to the date of suit.

Counsel for the defendant appellant then, practically upon the insistence of the Court that he could not succeed relying upon section 20 but might possibly succeed relying upon section 19, fell back upon that section. The next question, then, is whether section 19 has altered the law as it existed before the Act of 1922, or whether it still permits the defendant to fall back upon the acquisition of an interest between the suit and the decree as defeating the pre-emptor's right. The material words in section 19 are "No decree for pre-emption shall be passed in favour of any person unless he has a subsisting right of pre-emption at the time of the decree." Prior to the passing of the Act it is admitted that the plaintiff pre-emptor would in face of the authorities have had no "subsisting right." It is clear that the Act was an Act intended "to consolidate and amend the law" (see the preamble). But it is also beyond doubt that if the law was clearly established in one sense by a well-known *cursus curiae*, we cannot conclude that there was any intention to alter the law unless that intention was clearly expressed. If the law has not been altered then the plaintiff pre-emptor had no "subsisting right" at the date of the decree; his right had been defeated by the gift to the vendee prior to the decree. How then can he be said to have lost his

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"subsisting right" by anything appearing from the Act?" I suggested to the plaintiff respondent's counsel, and he of course accepted the argument, that possible inference might be drawn from the wording of section 20. That section makes it clear that the acquisition of an interest prior to the date of suit barred the plaintiff pre-emptor's right. It might not unreasonably be argued that the failure to embody in that section the defeat of the plaintiff pre-emptor's right by an acquisition subsequent to the date of suit, embodying the law as previously existing, suggests an inference that the legislature did not intend to embody that portion of the law previously existing that subsequent acquisition would defeat the plaintiff pre-emptor's right, and by the omission intended to indicate that the rights of the parties should be governed by the general principle that judgment must be passed on their rights as existing on the date of suit. There is something to be said for this contention, but I agree that it is too slight a foundation on which to base the conclusion that the legislature intended to amend the law, and that the plaintiff pre-emptor's subsisting right must be held to have been defeated. Similarly there is an apparent want of proper sequence in the rights of parties at the date of suit being declared in a section which follows that declaring the rights of parties at the date of the decree; and from this it is suggested that an inference may be drawn that section 19 was intended to deal with the loss of rights by a change in the position of the pre-emptor and section 20 with the loss of the pre-emptor's rights by a change in the position of the vendee. But here again the foundation is too slight upon which to found, even with the aid of the inference with which I have just above dealt, the conclusion that the legislature intended to alter the law. It appears to me therefore that, though I still unwillingly subscribe to the view that a plaintiff's right can be de-

feated by something done subsequently to the date of suit by the vendee, I must hold that the legislature knew what the law was prior to the Act as established by the *cursus curiae*, and that if it had intended to amend that law it would have done so in express words.

As the law stands, a plaintiff may go into court with absolute honesty and stating absolutely the whole true facts and may have an undoubted right to a decree, and then after he has incurred possibly much trouble and expenditure, the defendant by securing a gift to himself of a small share in the mahal may render the *bona fide* expenditure of time and money incurred by the plaintiff fruitless. That is, however, a question of what is expedient and proper and not an answer to the question how the law stands.

I would hold, therefore, that section 20 is not concerned with the effect of acquisitions subsequent to the date of the suit, but that the law as laid down in section 19 of Act No. XI of 1922 is that a defendant vendee can, by obtaining a gift to himself of a share in the mahal subsequent to the date of suit and prior to the decree defeat the plaintiff pre-emptor's right. With this answer I would return the reference.

I may add that since writing this judgement I have had the advantage of seeing the judgement of Mr. Justice KING and I agree with him in the view expressed therein as to the right of the court to consider in the case of this Act, at any rate, the marginal notes to the sections.

KING, J. :—I agree with Mr. Justice Boys that the plaintiff's right to a decree for pre-emption has been defeated by the provisions of section 19 of the Agra Pre-emption Act, 1922, and not by the provisions of section 20. As the reasons which lead me to the same conclusion are not precisely identical with his, I think it desirable to state my views.

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In this case the plaintiff had a right of pre-emption up to the date of the institution of the suit. After the institution of the suit, but before the passing of the decree, the purchaser (defendant No. 1) acquired in the mahal an indefeasible interest which gave him a right of pre-emption equal or superior to that of the plaintiff. The question is whether in these circumstances the plaintiff's right to a decree for pre-emption was defeated under section 19 or section 20 of the Act.

The object of the Act, as stated in the preamble, was to consolidate and amend the law relating to pre-emption. It is important, therefore, to bear in mind the previous law when we have to construe the provisions of the Act.

It is admitted that under the law administered before the commencement of the Act no plaintiff in a pre-emption suit could obtain a decree unless he could show a subsisting right of pre-emption, firstly at the date of the sale, secondly, at the date of the institution of the suit, and thirdly at the date of the decree. In the present case the plaintiff had a right of pre-emption up to the date of the institution of the suit, but he had no subsisting right of pre-emption, in the sense in which that expression was understood in the previous law, at the date of the decree, because the purchaser had by that time acquired a pre-emptive status equal or superior to that of the plaintiff. The plaintiff therefore would not have been entitled to a decree under the previous law.

The appellant (the purchaser) contends that the same rule of law holds good under the present Act. I think his contention is correct, but the ground upon which he bases his contention is wrong. In the courts below the purchaser relied entirely on section 20 of the Act in support of his contention. His learned counsel adopted the same attitude before the Division Bench

which made this reference. The result was that in the referring order there is no discussion of the question whether section 19 does not govern the decision of the appeal. It was assumed that section 20 was the only section applicable. It is difficult to understand why the appellant's learned counsel failed to rely upon section 19 when he could have quoted the most recent rulings of this Court in support of his contention. In any case, it is clearly necessary for us to consider the effect of section 19 as well as of section 20.

I agree with the view expressed by Mr. Justice Boys and by the referring Bench that section 20 does not help the appellant. The relevant words of that section read as follows:—"No suit for pre-emption shall lie where the purchaser . . . has acquired an indefeasible interest in the mahal which, if existing at the date of the sale, would have barred the suit."

The mere fact that the words "prior to the institution of such suit," which occur in the first portion of the section, cannot grammatically be read into the second portion does not, in my opinion, affect the result, although I agree that the meaning might have been better expressed. I think the section enacts the old rule that the plaintiff must have a subsisting right of pre-emption at the date of the institution of the suit. The section mentions certain events which would bar the institution of the suit and I take it as referring necessarily only to events that have taken place before the institution. I do not see how the *institution* of the suit can be said to be barred by an event that has not taken place before the institution. To my mind the language of the section clearly applies only to the acquisition of an interest before the institution of the suit.

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If any doubt remains, it should be set at rest by a reference to the marginal note. The question whether a marginal note can be referred to for an exposition of the meaning of a section depends upon whether the note has been inserted by, or under the authority of, the legislature. This principle is apparent from the reasons given in the leading case of *Claydon v. Green* (1), which lays down the old rule observed by the courts in England, that marginal notes ought not to be relied on in interpreting an Act of Parliament. "At the time when that Act (the Alehouse Act, 1828, 9 Geo. IV c. 61) passed, the Parliament roll had no marginal notes or punctuation, nor were the statutes separated into sections. We cannot, therefore, look at the marginal note for an exposition of the meaning of the section. Indeed it is difficult to see how the marginal notes could ever be used in the construction of Acts of Parliament, *seeing they are not put there by the legislature or assented to by them.*"

It seems that since 1849 marginal notes do appear on the rolls of Parliament, and there has been some conflict of judicial opinion whether marginal notes may be referred to when the true meaning of a section of an English statute enacted after 1849 is in doubt. The conflict of opinion, however, arises solely from the uncertainty existing in the minds of the Judges on the point whether the marginal notes can be considered to have been inserted with the assent of the legislature. All the English rulings which I have seen referred to on this point clearly imply, or expressly hold, that marginal notes can be referred to for the purpose of interpretation if they can be regarded as inserted, or assented to, by the legislature. It would indeed be quite unreasonable, in my opinion, to take the contrary view.

(1) (1868) L.R., 3 C.P., 511 (519).

The question then arises how far the marginal notes in the Agra Pre-emption Act can be regarded as inserted, or assented to, by the legislature. The answer depends upon the practice followed by the United Provinces Legislative Council in matters of legislation at the time when the Act was passed. On this point I am able to speak from personal knowledge, having been a member of the United Provinces Legislative Council in the capacity of Legal Remembrancer or Deputy Secretary or Secretary of the Legislative department for several years, including the period when this Act was passed.

I speak of the practice followed during the term of office of the first President of the reformed Council.

In the first place, every Bill is drafted with marginal notes. The practice of inserting marginal notes is expressly required by the instructions issued by the Government of India for statutory drafting, and has been in force in this province for many years. Every Bill is therefore introduced in the Council with a marginal note annexed to each clause. Even at the first stage, when the general principles of a Bill are under discussion, I have known a non-official member of the Council to criticize severely the drafting of a Bill owing to a mistake in a marginal note. I merely mention this fact as showing that the members of the Council do not consider marginal notes to be outside the sphere of their criticism.

When the Bill is referred to a select committee of the Council, the committee invariably consider the marginal notes along with the clauses and make such amendments in the marginal notes as they think fit. The practice of the Council differs in this respect from the practice of the House of Commons.

Finally, when the Bill is taken into consideration in the Council the marginal notes are not ordinarily read out and formally passed by the Council along with the

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clauses, but amendments to marginal notes, and the insertion of new marginal notes, form the subject of formal motions and resolutions. I would lay stress upon this fact as showing that the marginal notes are considered, and are assented to expressly or tacitly, by the Council.

The following extracts from the official report of the Proceedings of the United Provinces Legislative Council will serve to prove that the practice, during the period under consideration, was as I have stated. Two of the extracts relate to the Agra Pre-emption Bill itself, and two to a more recent Bill.

"Mr. C. M. KING :—I propose substituting 'Exclusion of pre-emption in respect of certain alienations' for the present marginal note (of clause 8 of the Agra Pre-emption Bill).

The amendment was put and adopted. The motion that clause 8 of the Bill as amended do stand part of the Bill was put and adopted."

(Volume IX, page 496, 1 November, 1922).

"Mr. C. M. King :—I further move that in the marginal note to clause 5 (of the Agra Pre-emption Bill) after the word "mahals" the words "or villages" be inserted, simply because we have provided for the right of pre-emption in villages as well as in mahals.

The motion was put and adopted. The motion that clause 5 as amended do stand part of the Bill was put and adopted."

(Volume XI, page 153, 14 December, 1922).

"Mr. C. M. King :—Thirdly I move that in the marginal note (to clause 44 of the Oudh Courts Bill) after the words 'Subordinate Judge' the words 'or Munsif' be inserted.

Amendments agreed to. Clause 44, as amended, ordered to stand part of the Bill."

(Volume XXII, page 485, 6 March, 1925).

"Mr. J. R. W. Bennett :—I move that the following marginal notes be inserted against the first and second paragraphs respectively of clause 48 (of the Oudh Courts



Bill) 'Bar of redemption suits when mortgage executed before the 13th February, 1844' and 'Redemption suits not barred where fixed term for redemption had not expired before 13th February, 1856.'

Amendment agreed to. Clause 48 as amended, ordered to stand part of the Bill."

(Volume XXII, page 506, 7 March, 1925).

Further examples may be found in Volume XXII, at pages 479 and 505.

The practice of the legislature in respect of marginal notes being as shown above, I think it is clear that the marginal notes of the Agra Pre-emption Act must be regarded as inserted in the Act with the assent and authority of the Legislative Council. I think they may be treated as parts of the Act to the same extent as the headings of Chapters, or the headings of groups of sections. They can, therefore, properly be regarded as giving a *contemporanea expositio* of the meaning of a section, when the language of the section is obscure or ambiguous. I do not think that this view conflicts with the dictum of their Lordships of the Privy Council in the case of *Balraj Kunwar v. Jagatpal Singh* (1):—"It is well settled that marginal notes to the sections of an Act of Parliament cannot be referred to for the purpose of construing the Act. The contrary opinion originated in a mistake, and it has been exploded long ago. There seems to be no reason for giving the marginal notes in an Indian Statute any greater authority than the marginal notes in an English Act of Parliament."

I take this to mean that no reason had been shown to their Lordships for ascribing to the marginal notes of an Indian statute any greater authority than could be ascribed to the marginal notes of an Act of Parliament, and therefore they were not prepared to ascribe any greater authority to the former. Very likely no such reason could have been given. The Indian statute under

(1) (1904) I.L.R., 26 All., 393 (406).

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consideration in that case was the Oudh Estates Act, which was passed by the Governor-General in Council in 1869. Their Lordships could not be expected to attach any authority to the marginal notes of that Act unless they were satisfied that the notes had been inserted with the assent of the legislature. Apparently no attempt was made to prove this proposition. It may be that the proposition was not even true. I find no trace in the arguments or judgment of any statement or explanation of the procedure followed by the Indian legislature in the year 1869 in respect of marginal notes. In the circumstances, therefore, it was only to be expected that their Lordships would not attach any authority to such notes.

I see no reason, however, for supposing that their Lordships would exclude all reference to the marginal notes of the Agra Pre-emption Act, 1922, even if they were satisfied, by reference to the official report of the Proceedings of the Legislative Council of the United Provinces, that such notes must be regarded as inserted with the authority and assent of the legislature. That would be a good reason for differentiating between the marginal notes of that Act and the marginal notes of an Act of Parliament.

The marginal note to section 20 reads as follows :—  
“Sale of property to pre-emptor or acquisition of right by the original purchaser *prior to suit*.” I may observe in passing that the word “pre-emptor” must be taken as equivalent to “person having a right of pre-emption,” but the important point is that the note clearly indicates that the events mentioned must have taken place “*prior to suit*.” This confirms the conclusion, to which I have arrived on other grounds, that section 20 has no application to the present case, where the purchaser acquired his interest *after* the institution of the suit. I

am unable to agree to the interpretation put upon section 20 in the case of *Qudrat-un-nissa Bibi v. Abdul Rashid* (1).

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The next question is whether section 19 defeats the plaintiff's right to a decree. I think it clearly does. At the time of passing the decree the plaintiff had no subsisting right of pre-emption, because the purchaser had by that time acquired a pre-emptive status equal or superior to that of the plaintiff. To my mind it is clear that section 19 enacts the old rule that the plaintiff cannot get a decree unless he shows a subsisting right of pre-emption at the date of the decree. I think the expression "subsisting right of pre-emption" must be understood in the sense in which it was understood before the passing of this Act. The plaintiff may lose his right in a variety of ways, and one way is by the purchaser's acquisition of an interest which puts him on the same level as the plaintiff in respect of the right of pre-emption. It may be considered hard that the plaintiff should be defeated by the purchaser acquiring such an interest after the institution of the suit, but this was the old rule, and I have no doubt but that section 19 enacts the same rule. I express no opinion on its justice or expediency. I am in full agreement with the interpretation put upon section 19 in the case of *Qudrat-un-nissa Bibi v. Abdul Rashid* (1) which has been followed in the case of *Ram Khelawan v. Bankey Bihari* (2) and *Deo Narain Singh v. Ajudhia Prasad* (3).

I agree that the reference should be answered in the affirmative in respect of section 19 and in the negative in respect of section 20.

KENDALL, J. :—I agree with my learned brothers in their interpretation of sections 19 and 20 of the Act, and need add nothing to what they have said on the

(1) (1926) I.L.R., 48 All., 616. (2) (1926) I.L.R., 49 All., 268.

(3) (1927) I.L.R., 49 All., 696.

1928 point. As regards the use of marginal notes I can support from my own experience as Legal Remembrancer and Judicial Secretary the remarks of Mr. Justice KING on the procedure in the reformed Legislative Council; and the conclusion at which I arrive is the same as his, namely that the marginal notes of the Agra Pre-emption Act, 1922, may properly be referred to by the court in order to interpret the meaning of that statute.

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*By the Court*:—Let the reference be returned with the answer that in the circumstances named the plaintiff's right of pre-emption is not defeated by the provisions of section 20 but is defeated by the provisions of section 19.

#### PRIVY COUNCIL.

J. C.  
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March, 15.

RAM SUNDER LAL AND ANOTHER (DEFENDANT) v. LACHHMI NARAIN AND ANOTHER (PLAINTIFFS).\*

[On appeal from the High Court at Allahabad.]

*Hindu law—Joint family property—Alienation by manager—Legal necessity for part of sale price—Purchaser making due inquiry—Sale for adequate price.*

A Hindu father, who with his minor sons constituted a joint Hindu family, sold a part of the family property, on which as well as on another part there was a pre-existing mortgage. By means of the sale the mortgage debts were satisfied and a part of the mortgaged property was freed from mortgage and was saved to the family. About 14 years later, the sons brought a suit to recover possession of the property sold, on the ground that the sale by the father was invalid. Upon the findings (1) that the sale itself was one which was justified by legal necessity, (2) that due inquiries as to the necessity had been made by or on behalf of the purchaser before the sale was effected, (3) that the sale was

\*Present:—Lord SHAW, Lord TOMLIN and Sir LANCELOT SANDERSON.

for adequate consideration, and (4) that legal necessity was proved by the defendant vendee to the extent of Rs. 7,744 out of a total price of Rs. 10,767, it was held that the sale must stand and that the fact that the defendant vendee, after a long interval of time, was not able to prove conclusively how the surplus was applied by the vendor was not sufficient ground for setting aside the sale.

*Hunoomanpersaud Panday v. Babooce Munraj Koonweree* (1), *Masit Ullah v. Damodar Prasad* (2) and *Sri Krishan Das v. Nathu Ram* (3), followed.

Judgement of the High Court reversed.

APPEAL (No. 46 of 1928) from a decree of the High Court (July 6, 1926) reversing a decree of the Subordinate Judge of Ghazipur.

The suit was brought by the respondents on March 2, 1922, to set aside a sale of joint property made on July 21, 1908, by their father and to recover possession of the property from the vendees.

The facts are fully stated in the judgement of the Judicial Committee.

The Subordinate Judge dismissed the plaintiffs' claim but directed the defendants to pay Rs. 2,550 to the plaintiffs. On appeal the High Court (KANHAIYA LAL and ASHWORTH, JJ.) set aside the decree of the Subordinate Judge and decreed the plaintiffs' suit conditionally on their paying Rs. 7,744 into court for the defendants.

1929. February 15. *Wallach*, for the appellants.

The respondents did not appear.

March 15. The judgement of their Lordships was delivered by Sir LANCELOT SANDERSON:—

This is an appeal by the defendants in the suit against a decree of the High Court of Judicature at

(1) (1856) 6 Moo. I.A., 393.

(2) (1926) I.L.R., 48 All., 518;  
I.R., 53 I.A., 204.

(3) (1926) I.L.R., 19 All., 149; L.R., 54 I.A., 79.

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Allahabad, dated the 6th of July, 1926, whereby a decree of the Subordinate Judge of Ghazipur, dated the 7th of April, 1923, was modified.

The suit was brought on the 2nd of March, 1922, by the plaintiffs, the minor sons of one Sat Narain Pande, who died in 1915, by their mother, Musammat Narain Kunwar, their certificated guardian, against the defendants, to recover possession of the property specified in the plaint, viz., Mauza Kanauli and Mauza Sikandra, and for a declaration that a certain sale-deed dated the 21st of July, 1908, purporting to have been executed by Sat Narain Pande, the father of the plaintiffs, in favour of one Misri Lal, the ancestor of the defendants, was invalid.

It was alleged by the plaintiffs that their father was a notorious debauchee and had squandered the joint family property in meeting the expenses of his debauchery and immoral habits; that the above-mentioned sale-deed was executed without any valid necessity and any legal antecedent debt and without any consideration by inserting wrong and fictitious debts and necessities therein.

The defence was to the effect that the property in suit had been sold for legal necessity for the benefit of the family for payment of antecedent debts, and for full consideration.

The learned Subordinate Judge found that, though the father of the plaintiffs was at one time addicted to immoral habits, he had reformed himself long before the transaction which was impeached in the suit and that the sale of the property was made for valid consideration and for the payment of pre-existing debts, except to the extent of Rs. 2,550.

The learned Judge made a decree that the plaintiffs' claim should be dismissed but that the defendants should

pay within two months the sum of Rs. 2,550 to the plaintiffs and the third son of Sat Narain Pande, who was not a party to the suit. The plaintiffs appealed to the High Court, and the defendants filed a cross objection.

The learned Judges, on appeal, agreed with the finding of the learned Subordinate Judge as to the allegations of debauchery on the part of Sat Narain Pande, and held that there was considerable evidence to show that Sat Narain Pande had at one time been addicted to immoral habits, but that he had reformed himself and that about 20 or 22 years before the trial of the suit he had married Musammat Narain Kunwar, the mother of the plaintiffs, with whom he lived amicably until his death in 1915, and by whom he had three sons and a daughter born to him. They further held that there was no satisfactory evidence that at the time the mortgages and the sale, referred to in their judgment, were effected he had applied the moneys taken in respect thereof to immoral purposes. There are, therefore, concurrent findings of fact on this part of the case which their Lordships see no reason for disturbing.

The learned Judges examined the evidence relating to the issue as to legal necessity and came to the conclusion that it had been proved that Rs. 7,744-8-0 represented debts due by Sat Narain Pande to third persons for which the plaintiffs were legitimately liable; that the plaintiffs were not liable for the remainder of the consideration specified in the sale-deed, the total of which was Rs. 10,767-7-0.

The learned Judges allowed the appeal, set aside the decree of the learned Subordinate Judge and made a decree in favour of the plaintiffs for possession of the disputed property subject to the payment by the plaintiffs within four months of the sum of Rs. 7,744-8-0. It

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was further ordered that in case of non-payment of the said money within the time mentioned the suit should stand dismissed. The cross-objection which had been filed by the defendants against the order of the learned Subordinate Judge directing them to pay to the plaintiffs and their brother the sum of Rs. 2,500, was disallowed.

The defendants appealed against the said decree of the High Court and they appeared by learned Counsel at the hearing before the Board. The plaintiffs respondents, however, did not file any case, and they were not represented at the hearing of the appeal.

Their Lordships are not able to uphold either of the decrees made by the courts in India.

Both the decrees, in their Lordships' opinion, are inconsistent with the principles laid down by the Judicial Committee in several cases, e.g., *Hunoomanpersaud Panday v. Babooee Munraj Koonweree* (1) and *Masit Ullah v. Damodar Prasad* (2) and *Sri Krishan Das v. Nathu Ram* (3).

The judgement of the High Court in the present case was delivered on the 6th of July, 1926, and in making the decree that the plaintiffs should recover possession of the property upon the payment of Rs. 7,744-8-0 within four months, the learned Judges apparently were following the form of decree which had been adopted by the Allahabad High Court in previous cases, e.g., *Gobind Singh v. Baldeo Singh* (4), *Ram Dei Kunwar v. Abu Jafar* (5), and *Dwarka Ram v. Jhulai Pande* (6).

In the last-mentioned case the ground of the judgement of the High Court was as follows:—

"If any part of the consideration was invalid and not binding on the plaintiff, the plaintiff would be entitled to have

(1) (1856) 6 Moo. I.A., 393.

(2) (1926) I.L.R., 48 All., 518 : L.R., 53 I.A., 204.

(3) (1926) I.L.R., 49 All., 149 : L.R., 54 I.A., 79.

(4) (1903) I.L.R., 25 A'., 370

(5) (1905) I.L.R., 27 All., 494.

(6) (1923) I.L.R., 45 All., 423.



the sale set aside. But if a portion of the consideration was good and binding on the plaintiff he would be entitled to reimburse it to the defendant. The form of the decree in a case of this kind should therefore be a decree for possession in favour of the plaintiff subject to his paying to the purchaser so much of the consideration as was required for the necessities of the family."

The decision of the Judicial Committee in the above-mentioned case of *Sri Krishan Das v. Nathu Ram* (1) was given in December, 1926, some five months after the judgement of the Allahabad High Court which is now under consideration. In the last cited case their Lordships of the Judicial Committee disapproved of the above-mentioned decisions of the Allahabad High Court reported in I.L.R., 25 All., 330, I.L.R., 27 All., 494, and I.L.R., 45 All., 429, and of another decision of the same Court in *Daulat v. Sankatha Prasad* (2).

Their Lordships pointed out that the decisions, of which they disapproved, were inconsistent with the principles which had been laid down in a series of cases by the Judicial Committee and which had been followed by the courts in India except in Allahabad.

Their Lordships referred to the judgement in the well-known case of *Hunoomanpersaud Panday v. Babooee Munraj Koonweree* (3) for the purpose of stating the principle on which cases such as this should be decided, and then proceeded as follows :—

"Where the purchaser acts in good faith and after due inquiry and is able to show that the sale itself was justified by legal necessity he is under no obligation to inquire into the application of any surplus and is therefore not bound to make repayment of such surplus to the members of the family challenging the sale."

It appears clear, therefore, that in view of the above-mentioned decisions of the Judicial Committee

(1) (1926) I.L.R., 49 All., 149;  
(2) (1924) I.L.R., 47 All., 355.

I.L.R., 54 I.A., 79.  
(3) (1856) 6 Moo. I.A., 393.

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It remains to be considered whether the defendants are entitled, as they contend, to succeed in their appeal and to have the plaintiffs' suit dismissed.

The material question is whether the sale itself was one which was justified by legal necessity. The property in dispute, viz., the villages of Sikandra and Kanauli, was sold by the deed of the 21st of July, 1908, by Sat Narain Pande, acting for himself and his minor sons, to Misri Lal, the ancestor of the defendants, for Rs. 10,767-7-0. The property in suit and certain lands in Basupur had been mortgaged to Misri Lal, and by reason of the sale the entire debts were discharged, and a sum of Rs. 885 was paid in cash to Sat Narain Pande. By reason of the sale the lands in Basupur were released from mortgage and were saved to the estate.

The learned Subordinate Judge, as already stated, held that the major portion of the consideration went to discharge old debts in respect of money borrowed for legal necessity. He held that the defendants had failed to prove that the sum of Rs. 2,498, part of the consideration for the sale, was paid to the plaintiffs' father for legal necessity, but that "the rest of the sale consideration has been proved to have been advanced for satisfaction of debts borrowed for legal necessities."

The learned Judges of the High Court agreed that there were debts due by Sat Narain Pande which were properly credited in the account of the consideration specified in the sale-deed to the extent of Rs. 7,744-8-0. The learned Judges, however, held that the defendants had not proved legal necessity in respect of the balance, though one of the learned Judges expressed a doubt as to two items, viz., Rs. 113 and Rs. 418.

The above-mentioned balance of the consideration money disallowed by the learned Judges of the High Court was in respect of sums alleged to have been advanced at various times for the purpose of paying Government revenue and meeting other expenses. Some of the items were specifically mentioned in mortgages effected in 1904, 1905 and 1907, and one item was in respect of cash alleged to have been paid at the time the sale was effected in July, 1908, for the purpose of paying Government revenue and meeting other family necessities. This suit was brought by the plaintiffs in March, 1922, nearly 14 years after the sale was effected, and when even a longer period had elapsed since some of the advances now questioned were made.

Although there was some evidence, in addition to the recitals in the various documents, that the sums were required for the above-mentioned purposes, it may have been and probably was difficult for the defendants to prove conclusively the manner in which the sums making up the balance, which was disallowed by the court in India, were utilized.

The material question, however, is whether the sale itself was one which was justified by legal necessity. There is no doubt that out of the total price, viz., Rs. 10,767, the sum of Rs. 7,744 at least was used for paying debts incurred by Sat Narain Pande for legal necessity. Their Lordships further are satisfied that due inquiries as to the necessity were made by or on behalf of Misri Lal, the purchaser, before the advances were made and the sale was effected.

There remains the question whether the consideration was adequate. There is but little evidence as to the value of the property at the time of the sale. The learned Subordinate Judge, acting on the evidence of a man who had been patwari of the villages since 1916, found the

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property to be worth Rs. 16,000, which their Lordships understand to be his estimate of the value of the property at the time of the trial in 1923. The learned Judge stated that the patwari admitted that the income had increased since the sale to the ancestor of the defendants in 1908. To what extent the property had increased in value is not evident.

In view of the facts of this case and the finding of the learned Subordinate Judge, their Lordships are unable to hold that the price obtained for the property in 1908 was inadequate.

Their Lordships, therefore, are of opinion that it must be taken on the facts of this case that the sale of the 21st of July, 1908, was effected after due inquiry made by or on behalf of the vendee as to the legal necessity, that the sale was for adequate consideration, that legal necessity was proved by the defendants to the extent of Rs. 7,744 at least out of a total price of Rs. 10,767, and that even assuming that the defendants after a long interval of time were not able to prove conclusively how the surplus was applied by Misri Lal, that fact alone is not sufficient ground for setting aside the sale.

For these reasons their Lordships are of opinion that the appeal should be allowed, that the decrees of the High Court and of the Subordinate Judge should be set aside, that the plaintiffs' suit should be dismissed and that the plaintiffs should pay the defendants' costs of this appeal and of the proceedings in both Courts in India, and they will humbly advise His Majesty accordingly.

Solicitors for appellants : *T. L. Wilson and Co.*

Solicitors for respondents : *Barrow, Rogers and Nevill.*

JAGGO BAI (PLAINTIFF) v. UTSAVA LAL (DEFENDANT).\*

J. C.

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April, 19.

[On Appeal from the High Court at Allahabad.]

*Limitation—Suit for possession—Suit by reversionary heir—  
Adverse possession for twelve years at widow's death—  
Suit for declaration during widow's life—Civil Procedure  
Code, order II, rule 2—Indian Limitation Act (IX of  
1908), schedule I, articles 120, 141.*

A decree against a Hindu widow in relation to her deceased husband's property is binding upon the reversioners although it is founded upon limitation; but under the Indian Limitation Act, 1908, schedule I, article 141, a suit by the reversionary heir for possession of immoveable property of the estate, as to which no decree has been made against the widow, is not barred by limitation if it is brought within twelve years of his estate falling into possession, even though the defendant has been in adverse possession for twelve years at the date of the death of the widow. *Hari Nath v. Mothurmohun* (1) and *Runchordas v. Parvatibai* (2), followed.

The article of the above Act applicable to a suit for a declaration that a will is invalid so far as it purports to dispose of a *malikana* granted by Government is article 120; and the right to sue does not accrue until the plaintiff has obtained a certificate under the Pensions Act, 1871; the suit is, therefore, not barred if brought within six years of obtaining the certificate.

A reversioner on the death of a Hindu widow, who has sued during the widow's life for a declaration as to his rights, is not barred by order II, rule 2, from including in a suit brought after her death a claim which the court was not competent to deal with in the previous suit owing to the absence of a certificate under the Pensions Act, 1871, or a claim to possession which he was not then entitled to.

APPEAL (No. 115 of 1927) from a decree of the High Court (November 26, 1925) reversing a decree of the Additional Subordinate Judge of Banda.

\*Present :—Lord BLANESBURGH, Lord TOMLIN, and Sir LANCELOT SANDERSON.

(1) (1893) I.L.R., 21 Cal., 8; L.R., (2) (1899) I.L.R., 23 Bom., 725.  
20 I. A., 183. L. R., 26 I.A., 71.

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The suit was brought by the appellant on the 15th of December, 1920, for a declaration that she was entitled to a *malikana* granted by the Government and to eject the respondent from a house at Warnagar. The properties in suit formed part of the estate of the appellant's father who died in 1875, and had been in possession of her mother for a widow's estate until February, 1914, when she died and the appellant became entitled as her father's heir. The defendant respondent pleaded that the suit was barred by limitation, and that he had acquired title by adverse possession; he also pleaded that the suit was barred by *res judicata* under order II, rule 2 and section 11, explanation (iv) of the Code of Civil Procedure, having regard to a suit brought by the appellant in 1890.

The facts are fully stated in the judgement of the Judicial Committee.

The trial Judge decreed the suit, but his decree was reversed by the High Court. The learned Judges (MEARS, C. J., and LINDSAY, J.), held that the suit was barred by adverse possession; in their view however the suit was not barred by *res judicata*.

1929. March 1, 4, 5, 7. *DeGruyther, K. C.* and *Abdul Majid*, for the appellant:—The suit was of the precise description of that referred to in the Indian Limitation Act, 1908, schedule I, article 141, so that the period was twelve years from the death of the widow. Article 144 by its terms does not apply when any other article does so. The *malikana* was immoveable property being an annual sum arising out of land; that view was not contested in India. It is well established by decisions in India that under the corresponding articles of Acts of 1871 and 1877, a reversioner has twelve years from the death of the widow in which he may sue for possession, and that his claim is not affected by adverse

possession during the widow's life: *Srinath Kur v. Prosunno Kumar* (1), *Ram Kali v. Kedar Nath* (2), *JAGGO BAI v. Venkataramayya v. Venkatalakshmmamma* (3), *Cursan-UTSAVA LAL. das Govindji v. Vundravandas Purshotam* (4). Those decisions have been frequently followed in the respective High Courts. The principle so laid down was affirmed by the Board in *Runchordas v. Parvatibai* (5). In *Vaithialinga Mudaliar v. Srirangath Anni* (6) a decree had been obtained against the widow; the Board decided nothing adverse to the present contention. The decision of a Full Bench of the Allahabad High Court in *Bankey Lal v. Raghunath Sahai* (7) is contrary to the decision now appealed from. Cases decided under the Limitation Act of 1859 do not apply; a new principle having been introduced by the Act of 1871 and maintained in subsequent Acts.

*Upjohn, K. C. and Parikh*, for the respondent:—  
The *malikana* was not a rent charge but merely a personal right, and therefore not immoveable property; so far as the suit related to the *malikana* article 120 applied, and the suit was thereby barred. But in any case the suit was barred. The defendant had been in adverse possession for twelve years when the widow died, and under section 28 had acquired a title. The plaintiff was therefore not "entitled to the possession" of the property on the death of the widow so as to make article 141 applicable. Article 141 cannot have the effect of divesting a title. The Act of 1871 did not destroy the principle laid down in the *Shiragunga* case (8) that the whole estate is vested in the widow, and its application to limitation in *Nobin Chunder v. Issur Chunder* (9). The decision last cited was approved by the Board in

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| (1) (1883) I.L.R., 9 Cal., 934.                      | (2) (1892) I.L.R., 14 All., 156.                      |
| (3) (1897) I.L.R., 20 Mad., 493.                     | (4) (1889) I.L.R., 14 Bom., 482.                      |
| (5) (1899) I.L.R., 23 Bom., 725; L. R., 26 I.A., 71. | (6) (1925) I.L.R., 48 Mad., 883; L. R., 52 I.A., 322. |
| (7) (1928) I.L.R., 51 All., 188.                     | (8) (1863) 9 Moo. I. A., 539.                         |
| (9) (1868) 9 W.R., 505.                              |   |

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*Aumirtolall Bose v. Rajoneekant* (1) and recently in *Vaithialinga Mudaliar v. Srirangath Anni* (2) and *Mata Prasad v. Nageshar Sahai* (3). The decision in *Runchordas'* case (4) does not apply as the property there in suit was in the hands of trustees and there could be no adverse possession; also the judgement must be read subject to the explanation in *Vaithialinga Mudaliar v. Srirangath Anni* (2). Reference was made also to *Hari Nath v. Mothurmohun* (5) and *Risal Singh v. Balwant Singh* (6).

Further the suit was barred by order II, rule 2, as the appellant in her suit of 1890 could have claimed that the alienations of the *malikana* and the house were invalid: *Janaki Ammal v. Narayanasami Ayer* (7).

*DeGruyther, K. C.* in reply :—In *Runchordas'* case (4) the Board decided the question of limitation arising in this appeal, rejecting the very argument now relied upon. Cases under the Act of 1859, and cases in which there was a decree against the widow, do not apply. If article 120 applies as to the *malikana* the absence of a certificate under the Pensions Act, 1871, prevented the appellant from enforcing her rights until within six years of the present suit. The suit is not barred by order II, rule 2, because the plaintiff had in 1890 no right to possession, and as to the *malikana* she had no certificate.

April, 19. The judgement of their Lordships was delivered by LORD TOMLIN :—This is an appeal from a decree, dated the 26th of November, 1925, of the High Court of Judicature at Allahabad reversing in part a decree, dated the 19th of May, 1922, of the Subordinate Judge of Banda.

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| (1) (1875) L.R., 2 I.A., 113 (121).  | (2) (1925) I.L.R., 48 Mad., 883; |
| (3) (1925) I.L.R., 47 All., 883;     | L.R., 52 I.A., 322.              |
| L.R., 52 I.A., 398.                  | (4) (1899) I.L.R., 23 Bom., 725; |
| (5) (1893) I.L.R., 21 Cal., 8; L.R., | L.R., 26 I.A., 71.               |
| 20 I.A., 183.                        | (6) (1918) I.L.R., 40 All., 593; |
| (7) (1916) I.L.R., 39 Mad., 634;     | L.R., 45 I.A., 168.              |
| L.R., 43 I.A., 207.                  |                                  |

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The plaintiff is under Hindu law the heiress of her father, Uttam Ram, who died on the 30th of October, 1875, without having had a son. Her right to possession of her father's estate did not accrue until February, 1914, on the death of her father's widow, Deo Koer (hereinafter called the mother). The mother was entitled to the estate while living.

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At the death of Uttam Ram there were also living his mother, Jarao Bai (hereinafter called the grandmother), and his deceased brother's widow, Man Koer (hereinafter called the aunt).

The estate of Uttam Ram included (*inter alia*) several villages, an 8-anna share in the village of Pachnehi, and a house at Warnagar in Baroda.

The other 8-anna share in the village of Pachnehi was owned by Durga Prasad, who was a debtor to the estate of Uttam Ram.

After Uttam Ram's death the aunt, with the assistance apparently of the grandmother, got possession, to the exclusion of the mother, of some of the villages or of a half share therein, and also of the house at Warnagar. The grandmother died in 1877.

By a document, dated the 10th of September, 1880, Durga Prasad, the mother and the aunt affected to release the village of Pachnehi to the Government in return for a perpetual *malikana* of Rs. 2,000, one-half of which represented the share of Uttam Ram's estate in the village and the other half of which represented the share of Durga Prasad therein.

By a sale-deed, dated the 6th of October, 1880, Durga Prasad made over Rs. 500, representing one-half of his share in the *malikana* to the mother and the aunt in satisfaction of his indebtedness to Uttam Ram's estate. Thereafter, therefore, Rs. 1,500 out of the *malikana* of



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UTSAVA LAL. Rs. 2,000 formed part of Uttam Ram's estate. In fact, the mother and the aunt received payment of the *malikana* of Rs. 1,500 in equal moieties.

In 1886 the mother began a suit (No. 237 of 1886) in the court of the Subordinate Judge at Banda against the aunt, seeking to establish her title as an heir of Uttam Ram to the villages, or share of villages, in the aunt's possession, and to dispossess the aunt therefrom, and to establish her title to the whole of the *malikana* of Rs. 1,500. No reference was made in the plaint to the house at Warnagar.

The Subordinate Judge gave judgement in favour of the mother in respect of the villages, but held that in the absence of a certificate under the Pensions Act, 1871, the court was not competent to deal with the *malikana*. The decision of the Subordinate Judge as to the villages was reversed on appeal to the High Court of Judicature at Allahabad. Thereupon the mother appealed to His Majesty in Council.

Pending the appeal of the mother to His Majesty in Council the plaintiff began a suit (No. 481 of 1890) in the court of the Subordinate Judge of Banda against the mother and the aunt, seeking to establish her title as reversionary heir of Uttam Ram, subject to the mother's interest as widow to the immoveable property of Uttam Ram mentioned in the plaint, including the villages of which, or of a share of which, the aunt had possession. The plaintiff also sought to have a document, dated the 9th of October, 1877, purporting to be an arbitration award on which the aunt relied, declared invalid. The plaint referred to the village of Pachnehi, but contained no reference to the house at Warnagar.

On the 30th of June, 1891, the Subordinate Judge declared that the plaintiff was entitled to succeed to the property in dispute on the mother's death, and that on

the mother's death the arbitration award of the 9th of October, 1877, and other proceedings by which the aunt had become possessed of the property in dispute would be void as against the plaintiff.

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On the 16th of January, 1894, an appeal by the aunt to the High Court of Judicature at Allahabad was dismissed with costs.

In the meantime the mother's appeal to His Majesty in Council in the suit No. 237 of 1886, came before their Lordships' Board, and in July, 1894, the appeal was allowed, and the judgement of the Subordinate Judge was restored in respect of the villages in dispute, but the view of the courts below that under the Pensions Act, 1871, there was no jurisdiction in the absence of a certificate to deal with the *malikana* was affirmed: See *Deo Kuar v. Man Kuar* (1).

As the result of this litigation the mother apparently recovered possession of all the villages, but the aunt continued to receive one-half of the *malikana* of Rs. 1,500, and remained in possession of the house.

The mother died in February, 1914, and, thereupon, the plaintiff succeeded to the property, possession of which had been recovered from the aunt.

The aunt died on the 20th of June, 1920, having by her will, dated the 3rd of July, 1919, affected to dispose in favour of her nephew, the defendant, of the share of the *malikana* which she was receiving and of the house at Warnagar.

The plaintiff then claimed to be entitled to the whole of the *malikana* of Rs. 1,500 and to the house. In consequence of the dispute the Government withheld payment of the *malikana*.

(1) (1894) I.L.R., 17 All., 1; L.R., 20 I.A., 143.

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On the 15th of December, 1920, the plaintiff having first obtained the necessary certificate under the Pensions Act, 1871, launched against the defendant the present suit in the court of the Subordinate Judge of Banda.

By her plaint the plaintiff alleged (paragraph 9) that she was in possession of the entire property which was in the possession of the mother, but that on the death of the aunt it was found that the aunt had executed a will dated the 3rd of July, 1919, in favour of the defendant in respect of the *malikana* amount, certain *muafi* property, and the house at Warnagar, whereas the aunt had not title or power to make a will, that the aunt was in possession merely in lieu of maintenance allowance as a widow of the family and that for this very consideration she had not been deprived and dispossessed of the *malikana* amount and other property, and that the will was totally invalid and ineffectual against the plaintiff, and (paragraph 13) that the mother as a widow had only a life interest in the family property, and that the aunt had no right in the property except that of maintenance, that the mother had no power to transfer to the Government by means of the document of the 10th of September, 1880, the village of Pachnehi, which was of considerable value, and that, therefore, the plaintiff wanted to bring a suit for recovery of possession of the said property, but that as the time for the suit given in the certificate would expire on the 19th of December, 1920, and as, according to law, it was necessary to give a formal notice to Government before the institution of a suit for recovery of possession of the property the plaintiff had in the plaint included only a claim for declaration of right as regards the *malikana* amount by invalidation of the will subject to her rights regarding recovery of possession of the property.

The plaintiff then asked (*inter alia*) for the following relief : (a) That it might be declared that the alleged will of the aunt was invalid and unenforceable as against the rights of the plaintiff, and that by means of it the defendant had not acquired any rights to get Rs. 750, the *malikana* amount or any right in other property in respect of which the will had been made, and (b) that the plaintiff might be put in possession of the *muafi* property and the house at Warnagar by dispossession of the defendant.

On the 19th of May, 1922, the Subordinate Judge ordered that the plaintiff's claim for a declaration as prayed in respect of the *malikana* and the house at Warnagar, and her claim for recovery of possession of the house be decreed. In his judgement the learned Judge held that the suit was not barred by rule 2 of order II of the Code of Civil Procedure, and that the aunt had not been in adverse possession of the *malikana* and the house for over twelve years as against the plaintiff. He also held that the plaintiff's claim was not barred by the Limitation Act, and that the aunt had no right to dispose by her will of the *malikana* or the house. The Judge dismissed the suit as to the *muafi* lands, and there was no appeal by the plaintiff as to this part of his decision.

The defendant appealed to the High Court of Judicature at Allahabad against the decree so far as it was adverse to him. On the 26th of November, 1925, the High Court allowed the appeals, set aside the decree of the Subordinate Judge so far as it related to the *malikana* and the house, and dismissed the suit. In the judgment of the High Court it was held that the aunt had been in adverse possession, that time began to run against the plaintiff in the lifetime of the mother when the aunt first took possession and that the plaintiff was

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CHITSAVA LAL. therefore, statute barred. It was further held that as in the previous suit (No. 481 of 1890) by the plaintiff against the mother and the aunt there had been no jurisdiction in the absence of a certificate to deal with the *malikana*, and as the house had not been included in the suit there was no *res judicata* binding the plaintiff.

The plaintiff obtained leave to appeal to His Majesty in Council, and appealed accordingly.

Before their Lordships' Board it was but faintly contended by the plaintiff that the possession of the aunt had not been adverse, and their Lordships are of opinion that it was adverse.

On the part of the plaintiff it was urged that article 141 of the Limitation Act applied, and that as under that article in a suit for possession by a Hindu entitled to possession of immoveable property on the death of a Hindu female the time allowed is twelve years from the death of the female, the plaintiff was entitled to succeed on the appeal, because at the institution of the suit twelve years had not run from February, 1914, the date of the death of the mother.

On the part of the defendant it was contended (1) that by reason of rule 2 of order II. of the Code of Civil Procedure the plaintiff was precluded from bringing the suit, having regard to the fact that she had in the previous suit (No. 481 of 1890) against the mother and aunt already sought to establish her title as heir; (2) that the *malikana* was not immoveable property; (3) that in regard to the *malikana* the suit was not a suit for possession, and that, therefore, article 141 of the Limitation Act, 1908, did not apply; (4) that so far as the *malikana* was concerned article 120 applied, and that under that article six years only from the date when the right of action accrued is allowed with the result that as more than six years had run between the date of the mother's death and the institution of the suit the plaintiff's claim

in respect of the *malikana* was statute barred; and (5) that upon the true construction and effect of article 141 of the Limitation Act, 1908, a reversionary heir is not entitled to the benefit of twelve years from the death of the female in a case where at the death of the female adverse possession had already run for twelve years against her in her lifetime, and that as the aunt had been in adverse possession against the mother for more than twelve years before the mother's death this article could not avail the plaintiff, and that the barring of the mother in her lifetime had, upon the principle of the *Shivagunga* case (1), operated to bar the interest of the plaintiff.

These contentions of the defendant accordingly require to be dealt with seriatim :

(1) By rule 2 of order II of the Code of Civil Procedure it is provided (sub-clause 1) that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, but that a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of the court, and (sub-clause 2) that where a plaintiff omits to sue in respect of or intentionally relinquishes any portion of his claim he shall not afterwards sue in respect of the portion so omitted or relinquished.

By reason of the absence of a certificate under the Pensions Act, 1871, the court, in the previous suit (No. 481 of 1890) was not competent to deal with the question of the *malikana*, and the plaintiff had no right of action in respect of it. In their Lordships' opinion the plaintiff's claim to the *malikana* was not, therefore, part of the claim which she was entitled to make in the previous suit. The house was not mentioned in the previous suit. In that suit the plaintiff was seeking to establish her title to her father's estate as heir in reversion on

(1) (1863) 9 Moo., I.A., 539.

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her mother's death. She was not seeking, and could not then have sought, to recover possession from the aunt of any particular item of property forming part of that estate. In the present suit she is seeking to recover possession of the house upon the footing that it forms part of the estate and that the defendant is in wrongful possession of it. The present cause of action arises out of tortious conduct on the part of the defendant or his predecessor the aunt in respect of the house, and is in their Lordships' opinion, a cause of action distinct from that in the previous suit. The claim which the plaintiff is now making could not in fact have been made in the previous suit.

The first contention of the defendant therefore fails.

(2) Their Lordships are satisfied that the point as to the *malikana* not being immoveable property was not taken in either of the courts below, and that each of the courts below treated the *malikana* as immoveable. In these circumstances, the defendant not being willing that there should be any remand of the case for further evidence, their Lordships are of opinion that the point is not open.

(3) Having regard to the language of paragraphs 9 and 13 of the plaint in the suit and to the form of the relief sought therein, their Lordships do not consider that the suit, so far as the *malikana* is concerned, is a suit for possession or within the operation of article 141 of the Limitation Act.

(4) In their Lordships' view article 120 is the relevant article so far as the *malikana* is concerned. Under the Pensions Act, 1871, however, there is, in their Lordships' opinion, no right of action at all in respect of such a subject-matter as the *malikana* unless and until a certificate under the Act has been obtained. Their Lordships therefore hold that as less than six years had run



between the grant of the certificate and the institution of the present suit the plaintiff's claim in respect of the *malikana* is not statute barred under article 120.

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(5) Article 141 of the Limitation Act, 1908, admittedly applies to the claim to recover possession of the house. The point raised by the defendant upon the construction and effect of this article is of importance, and is one upon which there has been some difference of opinion in India.

Under Act XIV of 1859, suits for the recovery of immoveable property had to be brought within twelve years from the time when the cause of action arose. The Limitation Act of 1871 which repealed the Act of 1859, employed different language. Article 142 in the second schedule of that Act prescribed for a suit for possession of immoveable property on the death of a Hindu widow a period of limitation of twelve years beginning to run from the time when the widow died. This provision, enlarged so as to cover a suit by a Muhammadan, was reproduced in the Act of 1877, and again in article 141 of the Act of 1908.

The judgement of their Lordships' Board in the *Shiragunga* case (1), established the principle of the representation of the inheritance by a Hindu widow. That case was decided during the currency of the Act of 1859.

In *Hari Nath v. Mothurmohun* (2), their Lordships' Board held that the effect of the Acts of 1871 and 1877 was not to except from the rule laid down in the *Shiragunga* decision the case where a decree had been obtained against a Hindu widow in her lifetime founded upon the law of limitation. Sir RICHARD COUCH, in delivering the judgement of the Board, said: "Their

(1) (1863) 9 Moo. I.A., 539.

(2) (1893) I.L.R., 21 Cal., 8; L.R.,  
20 I.A., 183.



1929 Lordships see no ground for this contention." (i.e. that the case was excepted) "The words 'entitled to the possession of immoveable property' refer to the then existing law."

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It is therefore established by this decision that where a decree founded upon the law of limitation is obtained against the widow in her lifetime the reversionary heir is barred and does not get the benefit of article 141.

The question raised by the present case is whether the same result follows where there has been no decree, though at the death of the widow a stranger has been in adverse possession for twelve years or more.

In their Lordships' judgement where there has been no decree against the widow or other act in the law in the widow's lifetime depriving the reversionary heir of the right to possession on the widow's death, the heir is entitled, after the widow's death, to rely upon article 141 for the purpose of the determination of the question whether the title is barred by lapse of time. To hold otherwise would in their Lordships' opinion, in effect, compel the court in determining a question within the scope of the article to ignore the express words of the article.

But their Lordships are further of opinion that the point is already concluded by the judgement of their Board in *Runchordas v. Parvatibai* (1). In that case a testator who died in 1869, leaving two widows, devised the whole residue of his estate to trustees for *dharam*. One widow died in 1871, and the other died in 1888. After the death of the second widow the heir of the testator sued for a declaration that the devise to *dharam* was void and for administration. The High Court held that the gift in *dharam* was invalid and there was an intestacy. The High Court further held that the possession of the trustees for *dharam* since the testator's death had been

(1) (1899) I.L.R., 23 Bom., 725; L.R., 26 I.A., 71.

adverse as against the widows and the heir but that the plaintiff's claim to the immoveable property was not barred. It was also held that the plaintiff's claim to the moveable property was barred by limitation. On appeal to His Majesty in Council their Lordships' Board held that article 141 of the Act of 1877 (now reproduced in article 141 of the Act, 1908), applied to the immoveable property, and that under it time ran from the death of the second widow, and that, therefore, the plaintiff in the suit was not barred by limitation. It was also held that article 120 of the Act, 1877 (now reproduced in article 120 of the Act, 1908), applied to the moveable property, and that the right of the plaintiff in the suit to sue under that article only accrued on the death of the second widow, and was, therefore, also not barred.

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The case of *Vaithialinga Mudaliar v. Srirangath Anni* (1), illustrates the application of the rule in the *Shivagunga* case (2), where a decree founded upon adverse possession has been obtained against a Hindu widow in her lifetime. The decision is not, in their Lordships' judgement, in conflict with that in *Runchordas v. Parvatibai* (3), in which no decree had been obtained against the widow, nor had there been any other act in the law in the lifetime of the widow destroying the heir's interest.

In their Lordships' judgement, therefore, the appeal succeeds, with the result that the decree of the High Court ought to be discharged and the decree of the Subordinate Judge restored, and their Lordships will humbly advise His Majesty accordingly. The defendant must pay to the plaintiff the costs of the appeal to the

(1) (1925) I.L.R., 48 Mad., 883; (2) (1863) 9 Moo. I.A., 539.

L. R. 52 I.A., 322.

(3) (1899) I.L.R., 23 Bom., 725; L.R., 26 I.A., 71.

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TSAVA LAL. High Court and the costs of the appeal to His Majesty  
in Council.  
Solicitors for appellant: *Summerhays, Son and  
Barber.*

Solicitors for respondent: *T. L. Wilson and Co.*

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### APPELLATE CIVIL.

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*Before Mr. Justice Sen and Mr. Justice Weir.*

1928  
August, 8. KALYAN DAS (PLAINTIFF) v. JAN BIBI AND ANOTHER  
(DEFENDANTS.)\*

*Act No. IV of 1882 (Transfer of Property Act), section 51—  
Improvement—Bona fide purchase without notice of  
mortgage—Improvement made in bona fide belief of  
absolute title—Equity—Act not exhaustive.*

A *bona fide* purchaser of a house for value, without notice of an existing simple mortgage, and honestly believing in good faith that she was absolutely entitled to the house, improved and rebuilt it at considerable cost. On suit by the mortgagee for sale of the house, *held* that although section 51 of the Transfer of Property Act did not in terms apply, yet the rule of equity upon which that section was based might very well be extended to the case, and upon that basis the court was justified in ordering the plaintiff to pay the cost of the improvements as a condition precedent to bringing the mortgaged property to sale.

The Transfer of Property Act is not exhaustive and does not exclude any equitable principle such as may regulate the rights and liabilities of the parties in a case not specifically provided by the legislature.

THE facts of the case, material for the purpose of this report, were briefly these:—One Faqire purchased a house on the 20th of November, 1909, and mortgaged

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\*Second Appeal No. 151 of 1926, from a decree of K. G. Harper, District Judge of Benares, dated the 28th of March, 1925, modifying a decree of M. M. Seth, City Munsif of Benares, dated the 17th of November, 1924.

it on the 28th of August, 1914, to Kalyan Das, and again mortgaged it on the 12th of January, 1915, to Arjun Sahu. Thereafter Faqire died, and his sons sold the house to Sri Kishun on the 22nd of October, 1915, and paid off Arjun Sahu. Sri Kishun sold it to Musammat Jan Bibi on the 1st of December, 1916, making over to her the deeds dated the 20th of November, 1909, 12th of January, 1915, and 22nd of October, 1915. No mention of the mortgage to Kalyan Das was made in any of the subsequent transactions, and as found by the courts Musammat Jan Bibi was a *bona fide* purchaser, without notice of the mortgage to Kalyan Das, and had, in the erroneous but honest belief that she was absolutely entitled to the house, rebuilt the house, which was in ruins, at considerable cost. Kalyan Das sued for sale on his mortgage and the suit was contested by Musammat Jan Bibi alone, on the ground, *inter alia*, that the plaintiff was not entitled to have the house sold without first paying to her compensation for the improvements made by her. The courts below held that section 51 of the Transfer of Property Act applied to the case, and the first court directed that Rs. 800 out of the sale proceeds should first be paid to Musammat Jan Bibi as compensation, whereas the lower appellate court made the payment of Rs. 800 to her a condition precedent to the property being sold. The plaintiff filed a second appeal to the High Court.

Babu Peary Lal Banerji, for the appellant.

Dr. Kailas Nath Katju, for the respondents.

SEN, J. :—This is a plaintiff's appeal which arises out of a suit for recovery of Rs. 1,080 by enforcement of a mortgage for Rs. 135, dated the 28th of August, 1914, executed by one Faqire Lohar in favour of the appellant.

[The judgement then proceeded to set forth the facts in detail, and continued.]

In 1914, when the mortgage was executed in favour of the plaintiff, his security was limited to a *katcha* tiled

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*Sen, J.*

house presumably in a dilapidated condition. After the purchase by defendant No. 2 (Musammat Jan Bibi) the property has been improved and its value considerably enhanced. No attempt whatsoever was made by the plaintiff mortgage to secure to himself the title-deeds relating to the house. The defendant on the other hand, had secured the original sale-deed, dated the 20th of November, 1909, and the subsequent title-deeds. It is significant that there is no mention of the plaintiff's mortgage in the subsequent mortgage-deed executed by Faqire in favour of Arjun on the 12th of January, 1915. Nor is there any allusion to it in the sale-deed in favour of Sri Kishun, dated the 22nd of October, 1915. Section 51 of the Transfer of Property Act provides that "when the transferee of immoveable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction, either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market value thereof, irrespective of the value of such improvement."

Section 51 is based upon the principle that he who seeks equity must do equity. It must distinctly be kept in view that cases founded upon the equitable rule of estoppel are beyond the purview of section 51. The rule of estoppel referred to above has been stated by Mr. Justice STOREY in his *Equity Jurisprudence*, first English edition, paragraph 1237, at page 861: "If the true owner stands by and suffers improvements to be made on the estate, without notice of his title, he will not be permitted in equity to enrich himself by the loss of another; but the improvements will constitute a lien on the estate." It cannot be said that the prior mortgagee is

the true owner who has stood by and it is doubtful if the rule of equitable estoppel can be extended to his case. Assuming that section 51 of the Transfer of Property Act applies to the case of the simple mortgagee seeking to enforce his mortgage, no question arises as to whether he has been sufficiently vigilant in safeguarding his own title or in asserting his right with reference to the property covered by the mortgage security. It is the subsequent transferee who has put up improvements and has to prove her good faith. The true rule has been stated by Dart to be that "when a purchaser for value is evicted in equity, under a prior title, he will be credited with all moneys expended by him in necessary repairs or permanent improvements, except improvements made after he has discovered the defect of title, and will be debited with the rent which he has received" (Dart, 7th edition, page 944). This view seems to be in accord with the rule of law enunciated in *Mill v. Hill* (1). In the case of *Thakoor Chander Poramanick v. Ramdhone Bhattacharjee* (2). Sir BARNES PEACOCK, C. J., is reported to have observed, as follows:—"We think it clear that, according to the usages and customs of this country, buildings and other such improvements made on land do not, by the mere accident of their attachment to the soil, become the property of the owner of the soil, and we think it should be laid down as a general rule that, if he who makes the improvement is not a mere trespasser, but is in possession under any *bona fide* title or claim of title, he is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building if it is allowed to remain for the benefit of the owner of the soil—the option of taking the building or allowing the removal of the material, remaining with the owner of the land in those cases in which the building is not taken

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(1) (1851) 3 H.L.C., 828.

(2) (1866) 6 W.R., 228.

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down by the builder during the continuance of any estate he may possess."

Sen, J.

The defendant does not appear to have acted either on the assumption of a risk or under circumstances of doubt relating to the security of her title. Registration does not *per se* amount to notice. There are no circumstances disclosed by the present case which entail an obligation upon the defendant to search the registry. The crucial question in the case is, did the defendant reasonably and honestly believe that she was absolutely entitled to the property at the time when she put up the new building? If the defendant erroneously but honestly believed that she was absolutely entitled to the property conveyed to her by Sri Kishun and that she was not a trespasser or an assignee from a trespasser and that she had not a limited interest in the property and was not a tenant, she was justified in spending money upon improvements by reason of the principle underlying section 51 of the Transfer of Property Act. The Transfer of Property Act is not exhaustive and does not exclude any equitable principle such as may regulate the rights and liabilities of the parties in a case not specifically provided by the legislature. It is doubtful how far section 51 of the Transfer of Property Act is in terms applicable to the facts of the present case. Musammat Jan Bibi has not been evicted from the premises by a person having a better title. It cannot be said that a prior simple mortgagee seeking to enforce the mortgage has a better title to the property. Nor can it be said that Musammat Jan Bibi is a person evicted from the premises by reason of the institution of the suit, although she might ultimately be evicted at the instance of the auction purchaser. In construing section 51 of the Transfer of Property Act, this Court has to adhere to the natural and etymological meaning which can be assigned to the words "evicted therefrom by any



person having a better title." Musammat Jan Bibi <sup>1928</sup>  
 not being a person evicted, and the plaintiff, as prior <sup>KALYAN DAS</sup>  
 simple mortgagee having only a right to sell the property <sup>v.</sup>  
 for the recovery of his mortgage dues, not being a person <sup>JAN BIBI.</sup>  
 having a better title, section 51 of the Transfer of Pro-  
 perty Act does not in terms apply, but the rule of equity  
 upon which section 51 is based may very well be extend-  
 ed to the case of Musammat Jan Bibi and upon that basis  
 the decree of the court below may very well be affirmed.

*Sen, J.*

In view of all the circumstances of the case the learned Judge was justified in ordering the plaintiff to pay the cost of the improvements as a condition precedent to bringing the mortgaged property to sale. I would, therefore, dismiss this appeal with costs.

WEIR, J :—I agree.

*Weir, J.*

BY THE COURT :—The appeal is dismissed with costs.

## REVISIONAL CRIMINAL.

*Before Mr. Justice Dalal.*

EMPEROR v. MANNI LAL AWASTHI.\*

<sup>1928</sup>  
 August, 17.

*Criminal Procedure Code, section 110(c)—Harbouring  
 "thieves"—"Thieves" does not include dacoits—Indian  
 Penal Code, section 216A.*

The provisions of section 110(c) of the Code of Criminal Procedure relating to harbouring of thieves are not to be applied to harbouring of dacoits, which is intended to be dealt with under the substantive provision of section 216A of the Indian Penal Code.

THE facts of the case, material for the purpose of this report, were briefly as follows :—One Manni Lal Awasthi was bound over by the Joint Magistrate of

\*Criminal Revision No. 437 of 1928, from an order of L. S. White, Sessions Judge of Cawnpore, dated the 3rd of April, 1928.



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Cawnpore under section 110 of the Code of Criminal Procedure on several counts. On appeal the Sessions Judge examined the facts and came to the conclusion that ultimately the case against Manni Lal must rest solely on the fact of harbouring dacoits. The Judge was, at the same time, of opinion that Manni Lal was not proved to be a receiver of stolen property. Manni Lal applied in revision to the High Court.

Babu *Sailanath Mukerji*, for the applicant.

The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

DALAL, J. :—[After setting out the facts the judgment continued.]

Under section 110, the harbouring of dacoits is not given as one of the reasons for calling upon a man to give security for good behaviour. What is stated in clause (c) of section 110 is that the accused is alleged habitually to protect or harbour thieves. The Judge's opinion was that a thief would include a dacoit, because a dacoit is, after all, a thief who commits theft with violence. At the same time, with his predominant sense of refinement, the Judge exempted from this class a robber who commits robbery through extortion. So, according to him the word "thief" would include a dacoit or a robber of one hue, while it would not include a dacoit or a robber of another hue. These distinctions without a difference have to be indulged in when more is sought to be read into a statute than exists on the face of it. His argument as to stolen property being applicable to property whose possession is obtained by dacoity is difficult to understand. Stolen property is specifically defined in section 410 as property, possession whereof has been transferred by crimes other than dacoity, and the possession of such property is punishable under section 411 of the Indian Penal Code. When property, possession

whereof has been transferred by the commission of dacoity is contemplated, there is a distinct section 412. There, only the words "stolen property" as defined in section 410 are not used, but further explanation is given that the possession must be of such property as the possessor thereof knew or had reason to believe to have been transferred by the commission of dacoity. This differentiation between sections 411 and 412 works in a way just the opposite to the argument advanced by the Judge. It indicates that when only the words "stolen property" are used, they do not mean property transferred by the commission of a dacoity.

It is always interesting to discover how legislation as to particular sections of a certain Code came into effect, in order to understand the meaning thereof. Dacoity is a very serious crime and therefore the attempt to commit it, even the preparation to commit it and being a member of a gang of dacoits, are all separately made punishable under different sections of the Indian Penal Code. At the time of the framing of the Code it was overlooked that dacoits might be helped by men honest to the outside world, so well expressed in the vernacular as "*safed posh*," who though not joining the dacoits or belonging to their gang in the sense of actively participating in the crime, gave shelter to them at the time when they needed it to escape pursuit. For that reason, in 1894 a penalty was provided for harbouring robbers or dacoits. This was done by the enactment of section 216A of the Indian Penal Code by section 8 of Act No. III of 1894. When the Criminal Procedure Code was enacted in 1898, the previous Code was of Act No. X of 1882. In the corresponding section 110 of this Act no provision was made for calling upon a man who made a habit of harbouring to enter into security. At that time, in 1898, penalty for the harbouring of

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robbers and dacoits was provided for a few years previously, and there remained provision to be made to make it dangerous to harbour thieves. There was a substantive offence in 1898 of harbouring only robbers or dacoits, because possibly it was not thought right to make it an offence to harbour a thief,—a theft has not such notoriety as robbery or dacoity which on its occurrence would be widely known and every honest man would be warned against giving shelter to persons taking part therein. The same notoriety would not attach to a theft as to a dacoity and therefore it was presumably considered unfair to make the harbouring of a thief an offence. At the same time, if a man made a habit of harbouring thieves, it would be possible to presume that he did so with full knowledge of the habits of life of his friends and visitors. So provision was made in section 110 when it was amended by Act No. V of 1898 to bring within its scope a man who made a habit of harbouring thieves. A consideration of these different stages of legislation leaves no doubt in my mind that the legislature did not desire that the provisions of section 110 should be applied to a harbouring of dacoits, the intention being that such a man should be dealt with under the substantive provision of the Indian Penal Code, i.e. section 216A.

\* \* \* \*

I allow the application. The bonds and securities taken from Manni Lal shall be discharged.

Before Mr. Justice Dalal.

EMPEROR v. BHAN DEB.\*

1923  
August, 17.

*Act (Local) No. II of 1916 (U. P. Municipalities Act), section 178(2)—“Adjacent to” a public street, meaning of—Building divided from public road by a wall and a canal distributory.*

A building which is divided from a public road by a wall and a canal distributory is not “adjacent to” a public road within the meaning of section 178(2) of the U. P. Municipalities Act. “Adjacent” must mean “joining at some point” and cannot mean to include two properties which are divided.

THE facts of the case sufficiently appear from the judgement of the Court.

Dr. Kailas Nath Katju, for the applicant.

The Assistant Government Advocate (Dr. M. Waliullah), for the Crown.

DALAL, J. :—The laxity with which penal statutes are made use of by public bodies is a matter of grave concern. No one takes the trouble of reading the law before launching a prosecution. In the present case the applicant has been convicted of an offence under the Municipal Act, section 307(b), on the ground that within the limits of a Municipality he erected a new part of a building or made material alterations therein without the Board's permission. Obviously clause (2) of section 178 of the Municipalities Act was lost sight of—that the notice referred to in sub-section (1) to be given by a person, who desires to erect a new part of a building or to make material alterations, shall only be necessary when the building abuts on or is adjacent to a public street or place or property vested in His Majesty or in the Board. In the Magistrate's court everything was taken for granted. It appears, however, that the reason

\*Criminal Revision No. 493 of 1928, from an order of F. D. Simpson, Sessions Judge of Kumaun, dated the 11th of May, 1928.

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for prosecution was clearly defined in the sessions court, and it was alleged that the buildings adjoined a public road. The Sessions Judge pointed out that what is marked by I on exhibit E was nowhere near a public road. The Sessions Judge says that the building marked II was adjacent to a public road, because it was divided from a public road by a canal and a wall only. Obviously by a canal the learned Judge meant a distributory, i.e. a narrow channel of water. If there is a wall separating this house from the public road, it is difficult to understand how the building can be called adjacent to the road. "Adjacent" must mean "joining at some point," and the meaning of the word is made clearer by the words "abutting on." What is attempted to be avoided is the danger of obstruction or encroachment on a public road. When there is a dividing wall there cannot be any obstruction or encroachment. However that may be, a penal statute must be strictly interpreted, and adjacent cannot mean to include two properties which are divided. The Government Pleader pointed out that the building was adjacent to a distributory. That, however, was not the material portion of the charge. There is nothing to show that the distributory is vested in the Notified Area, nor that the property is vested in His Majesty. There was no intention of prosecuting the applicant because he failed to obtain permission for making alterations in a building which was adjacent to a canal distributory. The prosecution cannot be permitted at the last moment, without notice to the accused, to change its ground. I am certain that the authorities connected with the Notified Area have not stopped to think of the limited nature of the property for which a notice under section 178(1) is necessary and fully believe that wherever in the notified area a building is erected, altered or added to, a notice is necessary. It is in this wrong belief that the present prosecution was launched.

In the notice itself no reference is made to the build-  
ings being adjacent to any public street or place or pro-  
perty vested in His Majesty or in the Board.

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v.  
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Two other objections were raised, but they have no substance. [These are not material for the purpose of the report and are omitted.]

I set aside the conviction and sentence and order the fine, if any recovered, to be refunded.

*Before Mr. Justice Dalal.*

EMPEROR v. GAYA PRASAD.\*

*Indian Penal Code, section 336—"Rashly or negligently"—*  
*Deliberate act not included—Indian Penal Code, section 153.*

1928  
August, 30.

A rash act is primarily an over-hasty act and is opposed to a deliberate act; even if it is partly deliberate, it is done without due thought and caution.

Where a *pujari* of a temple left the temple at night and from outside deliberately threw bricks at it, hoping that the Hindus of the locality would believe that the bricks came from the Muhammadan quarter and that this would lead to a riot between the two communities, *Held* that the act was a deliberate one and not a rash or negligent act within the meaning of section 336 of the Indian Penal Code; also, that the provisions of section 153 did not apply to the case.

THE facts of the case sufficiently appear from the judgement of the Court.

Mr. H. C. Desanges, for the applicant.

The Assistant Government Advocate (Dr. M. Waliullah), for the Crown.

DALAL, J. :—It is difficult to understand the arguments of the two subordinate courts. The applicant has been convicted of an offence under section 336 of the

\*Criminal Revision No. 599 of 1928, from an order of Syed Iftikhar Husain, Additional Sessions Judge of Pilibhit, dated the 5th of April, 1928.

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v.  
GAYA  
PRASAD.

Indian Penal Code. The section runs as follows:—  
“Whoever does any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished with imprisonment . . .” What was alleged and found by the two subordinate courts against the applicant was this. He was a *pujari* of a temple and left the temple at night in charge of a third person. While away from the temple he deliberately threw bricks at the temple, hoping that the Hindus would believe that the bricks came from the Muhammadañ quarter and that thereby the Hindus would be enraged against the Muhammadans and there would be a riot between the Hindus and Muhammadans. The applicant is held to have done that deliberately and not rashly or negligently. A rash act is primarily an over-hasty act and is opposed to a deliberate act. Even if it is partly deliberate, it is done without due thought and caution. Here there is no question of want of thought or want of caution. The applicant desired a certain result to follow from the throwing of bricks and he deliberately threw the bricks at the temple for that purpose. According to the findings of the two subordinate courts, there was neither rashness nor negligence in the act.

The learned Government Pleader was of opinion that the provisions of section 153 would apply: “Whoever malignantly, or wantonly, by doing anything which is illegal, gives provocation to any person, intending or knowing it to be likely that such provocation will cause the offence of rioting to be committed, shall be punished with imprisonment.” Here, the provocation has to be caused by the doing of anything which is illegal. The word “illegal” has been defined in section 43 and is made applicable to everything which is an offence or which is prohibited by law or which furnishes ground for a civil action. The throwing of a brick at a temple is so far not declared to be an offence, nor is it prohibited by law.

It may furnish grounds for a civil action if anybody was hit, but in the present case, nobody was hit. It cannot be said that the applicant's act was illegal.

The subordinate courts have themselves been doubtful of their finding. So they have taken refuge by raising a side issue. They say that the act of throwing a brick was rash and negligent because thereby the life of Dodhe, whom the applicant himself had left in the temple, was placed in danger. There was no such allegation made by the prosecution witnesses. The applicant, whose act was deliberate, must have taken good care to see that Dodhe was not hit by the bricks.

The conviction cannot be maintained. I set aside the order under section 562 of the Indian Penal Code.

Before Mr. Justice Dalal.

EMPEROR v. AJUDEHA PRASAD.\*

*Indian Penal Code, sections 161/116—Abetment of bribery—  
Offering bribe for doing something which the public  
servant has no power to do—Absence of such power  
immaterial.*

1928  
August, 30.

It is sufficient to constitute an offence under section 161, read with section 116, of the Indian Penal Code that there was an offer of a bribe to a public servant, in the belief that he had an opportunity or power in the exercise of his official functions to show the offeror a desired favour, although the public servant had in reality no such power.

THE facts of the case sufficiently appear from the judgement of the Court.

Mr. A. Sanyal, for the applicant.

The Assistant Government Advocate (Dr. M. Waliullah), for the Crown.

\*Criminal Revision No. 621 of 1928, from an order of H. J. Collister, Sessions Judge of Jhansi, dated the 4th of August, 1928.



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v.  
AJUDHIA  
PRASAD.

DALAL, J. :—Ajudhia Prasad Dhobi has appealed from his conviction under section 161 read with section 116 of the Indian Penal Code. Illustration (a) to section 116 says :—“A offers a bribe to B a public servant as a reward for showing A some favour in the exercise of his official function. B refuses to accept the bribe. A is punishable under this section.” The dhobi is not the actual A but he introduced the bribe-giver to the Assistant Superintendent of Police, Mr. Naqvi. Mr. Naqvi heard from a female servant what Ajudhia intended and made preparation to receive Ajudhia and the principal person, Narain Das, who desired that the Assistant Superintendent of Police should use favour in the exercise of his official functions. The favour desired by Narain Das was that his brother's name might be removed from register No. 8 of bad characters of the Jhansi police-station. There can be no doubt that Ajudhia and Narain Das appeared before the officer and offered a bribe which was not accepted. Learned counsel here has argued that the Assistant Superintendent was not in charge of this particular register and in the exercise of his official function could not remove the name of any person from that register. The official, therefore, was not in a position to show favour to Narain Das and that, therefore, if the official had accepted the money he would not have been guilty of accepting a bribe and for that reason the bribe-giver could not be guilty under the provisions of section 116 of the Indian Penal Code. In support of this view a ruling of the Madras High Court, in *Pulipati Venkiah* (1) was quoted, of which the head-note is : “In a charge under section 161, it must be shown that the accused took the bribe as a motive for doing an official act, that the charge against the Karnam was that he received a bribe from a villager on the understanding that he would get him some *darkhast* land. It does not constitute an offence under section 161, as getting dar-

(1) (1924) 47 M.L.J., 662.

*khast* land is not the official act of a Karnam." With all respect, in my opinion, the learned Judge appears to have overlooked illustration (c) to section 161, to which no reference is made in the judgment. That illustration is:—"A, a public servant, induced Z erroneously to believe that A's influence with the Government has obtained a title for Z and thus induced Z to give A money as a reward for this service. A has committed the offence defined in this section." In the Madras case the Karnam induced the villager to believe that in the exercise of his official act he could obtain *darkhast* land for the villager. Having regard to the illustration, I should have held the Karnam guilty under section 161. Mr. *Sanyal* had an ingenious argument in reply. He was of opinion that what the illustration pointed out was that A, though he promised to exercise influence, did not exercise influence and yet he would be guilty. According to counsel, A in the illustration was in a position to exercise influence with the Government to obtain a title. I am not aware of the existence of an official whose official duty it is to exercise influence with the Government to obtain a title. With the desire we all have for titles, such an official would not be able to drive away crowds from his door. Such an illustration of an impossible official duty is purposely given to indicate the purpose of the legislation that, even where an act is not within the exercise of the official duty of a public servant (such as the exercise of influence to obtain a title), if a public servant erroneously represents that the particular act is within the exercise of his official duty he would be liable to conviction under section 161 if he obtained a gratification by inducing such an erroneous belief in another person. The learned commentators of the book entitled "The Law of Crimes" have also commented adversely on a case of this Court which is not reported anywhere: *Kishan Lal v. King-Emperor* (1). I

(1) (1904) 1 A.L.J., 207 (Notes).

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cannot agree with the learned commentators. My opinion is in agreement with the opinion expressed in that case. All that is necessary to prove the offence is that a public servant had promised to show favour in the exercise of his official functions, although he might in reality have no such opportunity.

The conviction is upheld. I reduce the sentence to rigorous imprisonment for one month.

### APPELLATE CRIMINAL.

*Before Mr. Justice Dalal.*

EMPEROR v. JWALA AND ANOTHER.\*

1928  
Septem-  
ber, 24.

*Indian Penal Code, sections 489A/511—Attempt at counterfeiting currency notes—Product must be capable of causing deception—"Counterfeit"—Indian Penal Code, section 28.*

For a thing to be termed "counterfeit" according to the definition given in section 28 of the Indian Penal Code, there should be some sort of resemblance sufficient to cause deception. In a case of counterfeiting currency notes, where the ability of the accused persons and the capacity of the materials with which they worked were not such as to produce a currency note which would take in even the most ignorant villager: *Held* there could be no conviction under section 489A. read with section 511, of the Indian Penal Code.

THE facts of the case sufficiently appear from the judgement of the Court.

Appeal from jail.

The Government Pleader (Mr. Sankar Saran), for the Crown.

DALAL, J. :—Badri has been convicted of an offence of possessing instruments or materials for forging or counterfeiting currency notes, under section 489D. He

\*Criminal Appeal No. 656 of 1928, from an order of L. V. Ardagh, Sessions Judge of Shahjahanpur, dated the 5th of July, 1928.

and Jwala have been convicted of an offence under section 489A of counterfeiting currency notes. The offence of which they have been convicted is one of an attempt under section 511. These materials were found in Badri's house, and it has been proved that his intention was to forge currency notes. In my opinion, in considering an offence under this section it is not necessary to prove that Badri had the ability to produce counterfeit currency notes with the materials in his possession. The question, therefore, will not arise whether his ability and the materials at his command could have produced a note which may be termed counterfeit according to the definition given in section 28 of the Indian Penal Code.

The case, however, is different under section 489A. Whoever counterfeits, or knowingly performs any part of the process of counterfeiting, any currency-note or bank-note is to be punished under that section. A person is said to counterfeit who causes one thing to resemble another thing, intending by means of that resemblance to practise deception or knowing it to be likely that deception will thereby be practised. It is true that it is not essential that the imitation should be exact, but there should be some sort of resemblance sufficient to cause deception. In the present case the learned Judge has ridiculed both the ability of the appellants and the capacity of the materials to produce such a note as would take in even the most ignorant villager. He was of opinion that the accused were experimenting in order to discover a satisfactory method of counterfeiting. Such an experimental stage cannot be considered an attempt at counterfeiting. The learned Government Pleader rightly drew my attention to the illustrations to section 511 under which in cases where theft would not be possible by reason of the absence of any valuable property there would be an attempt at theft. In those cases, however, the accused does an act towards the commission of

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theft. In the present case no such act is possible because according to the Sessions Judge the appellants are incapable of performing such an act. If the materials had been perfect and the appellants had ability, and through some error in the operation or by sudden seizure the perfect article had not been produced, the acts of the appellants could have been called attempts. Every one, if he is so inclined, can commit a theft. It does not require any special ability. In the case of the counterfeiting of a currency note both ability and materials of a particular kind are required. If those materials and ability are not present it cannot be said that an act performed without the ability to counterfeit and without materials which may help to a useful counterfeiting would be an attempt. Moreover in the present case the appellants had done everything possible that they could do, and the result was a most pronounced failure. The stage of attempt had been passed and yet there had been a failure of realization. When admittedly according to the Sessions Judge no offence was committed under section 489A even after the appellants had used their full ability and utilized all the materials at their disposal, recourse cannot be had to the provisions of the Code relating to an attempt simply because the appellants' desire had ended in failure.

I uphold the conviction of Badri under section 489D but reduce the sentence to rigorous imprisonment for five years. His appeal is otherwise dismissed. I set aside the conviction and sentence of Jwala and order his release.

## APPELLATE CIVIL.

*Before Sir Grimwood Mears, Chief Justice, and Mr.  
Justice Mukerji.*

1928  
Novem-  
ber, 7.

KISHEN SAHAI AND OTHERS (PLAINTIFFS) *v.* RAGHU-  
NATH SINGH AND OTHERS (DEFENDANTS).\*

*Hindu law—Joint Hindu family—Alienation by father—  
Mortgage for payment of a pre-emption decree—Ante-  
cedent debt—Pre-emption decree not a debt—"Benefit  
to the estate"—Mortgage binding on pre-empted property.*

A pre-emption decree gives an option to the pre-emptor to obtain the property on making payment, but does not carry any order for payment, it is, therefore, not a "debt" in the proper sense of the term and can not constitute an antecedent debt. *Nathu v. Kundan Lal* (1) and *Kapildeo v. Thakur Prasad* (2), dissented from. *Bhagwan Das v. Mahadeo Prasad* (3) and *Shankar Sahai v. Bechu Ram* (4), followed.

Ordinarily a Hindu father cannot mortgage joint ancestral property for the purpose of making payment in compliance with the terms of a pre-emption decree obtained by him for the purchase of fresh property. *Shankar Sahai v. Bechu Ram* (4), followed. *Jagat Narain v. Mathura Das* (5), referred to.

Where, with the mortgage money the pre-emption decree was complied with, and the property obtained by pre-emption was included in the mortgage, the mortgage was binding and effective as regards the pre-empted property. ✓

Dr. *Kailas Nath Katju*, for the appellants.

Dr. *N. C. Vaish*, for the respondents.

MEARS, C. J., and MUKERJI, J. :—The suit arose out of a mortgage executed on the 12th of July, 1916, by Raghunath Singh, defendant No. 1, and his father

\* First Appeal No. 380 of 1925, from a decree of Syed Ali Mohammad, Subordinate Judge of Meerut, dated the 21st of May, 1925.

(1) (1910) 7 A.L.J., 1182. (2) (1913) 11 A.L.J., 961.  
(3) (1923) I.L.R., 45 All. 390. (4) (1925) I.L.R., 47 All., 381.  
(5) (1928) I.L.R., 50 All., 969.

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Sewak Ram, who has since died. The amount borrowed was a sum of Rs. 4,000. The plaintiffs pleaded that the mortgage was executed for legal necessity and was therefore binding, not only on Raghunath Singh, one of the mortgagors, but on his minor brother Khair Singh, defendant No. 2, and also on his minor son Bhopal Singh, defendant No. 3. Bhopal Singh alone contested the suit through his guardian. His contention was that the mortgage was not supported by legal necessity.

The learned Subordinate Judge found that there were four items which went to make up the entire mortgage money. These were the sums of Rs. 1,586, Rs. 1,800, Rs. 64 and Rs. 550.

As regards the first sum, the learned Judge found that it was borrowed to pay an antecedent debt payable by the mortgagors. Accordingly he found that both the defendants Nos. 2 and 3 were liable to pay the sum. He found that the sum of Rs. 64 had been obtained to meet the costs of the execution of the mortgage-bond. In his opinion this amount was for legal necessity. The learned Judge accordingly made a decree for the sale of the property mortgaged to recover these two sums.

As regards the sum of Rs. 1,800, the learned Judge found that it had been borrowed to pay the purchase-money for a pre-emption decree, and he thought that the members of the joint Hindu family could not jeopardize the ancestral family property in order to purchase fresh property. He accordingly held that the mortgage for the sum of Rs. 1,800 was not binding on the family.

As regards the sum of Rs. 550, the learned Judge found that it had been paid by the mortgagees, but that there was no legal necessity to support the same. The learned Judge accordingly granted a personal decree for the sums of Rs. 1,800 and Rs. 550.

In appeal the plaintiffs-appellants contend that on the evidence the entire mortgage-money was borrowed,

either for legal necessity, or for payment of antecedent debts. The first question that therefore arises with respect to the sum of Rs. 1,800, is this. Was there a debt existing at the date of the mortgage which Sewak Ram and Raghunath Singh were bound to pay? The learned counsel for the plaintiffs-appellants has relied on two cases, namely the case of *Nathu v. Kundan Lal* (1), and the case of *Kapildeo v. Thakur Prasad* (2), as laying down the proposition that where a Hindu father borrows money to pay the purchase-money under a pre-emption decree, he borrows money to pay an antecedent debt. This opinion has been dissented from in later cases and they are *Bhagwan Das v. Mahadeo Prasad* (3), and *Shankar Sahai v. Bechu Ram* (4).

We have considered the point and we are clearly of opinion that no debt, in the proper sense of the word, existed on foot of the pre-emption decree. The pre-emption decree gave the option to the pre-emptor to obtain property on payment of money. A pre-emption decree does not carry any order for payment. The decree is always conditional, namely, in case of payment certain property would belong to the plaintiff, and in case of non-payment the suit would stand dismissed, probably with costs. The mere fact that in the case of non-payment of the purchase-money a decree for costs would be passed against the pre-emptor, cannot invest the whole transaction with the character of a debt. It may be pointed out that the amount of costs is usually very small as compared with the purchase-money. The appellants' case, therefore, so far as it is based on the principle of antecedent debt, cannot be maintained.

Next it was argued by the learned counsel for the appellants that according to the recent Full Bench case of *Jagat Narain v. Mathura Das* (5), a head of a joint

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(1) (1910) 7 A.L.J., 1182.

(2) (1913) 11 A.L.J., 961.

(3) (1923) I.L.R., 45 All., 390.

(4) (1925) I.L.R., 47 All., 381.

(5) (1928) I.L.R., 50 All., 969.



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Hindu family is entitled to make a fresh purchase of property. It was argued that this case has shaken the authority of the case of *Shankar Sahai v. Bechu Ram* (1), and other cases which decided that a transaction by one member of a joint Hindu family which can bind the others must be of a defensive nature. We have accordingly read the Full Bench case and we are of opinion that the facts of the case actually bring themselves within the purview of the decision in the case of *Shankar Sahai v. Bechu Ram* (1).

The facts of the Full Bench case were these. A Hindu family possessed property which was situated far away from the place of residence and it was found to be inconvenient to manage the property. The adult male members of the family sold the property with the express purpose of purchasing nearer home, so that the purchased property might be better managed. As a matter of accident, it happened that the purchase-money was lost because the bank, in which the money had been put for safe custody, had closed its doors. As has been laid down by the Privy Council, and in the case of *Inspector Singh v. Kharak Singh* (2), to find whether a certain transaction is binding on the family or not its nature must be examined at the date of the transaction and it should not be judged by what happened later. On this principle the fact that the money was lost owing to the bank having collapsed had no bearing. The transaction was found by the learned Judges to have been for the benefit of the family. It was, in fact, in its inception an act which was designed to protect or defend the family from an inevitable recurring loss, the property by reason of its situation yielding less than nearer property would do. As we have stated, the facts bring the case within the principle enunciated in the case of *Shankar Sahai v. Bechu Ram* (1). Indeed it has been put forward by the learned

(1) (1925) I.L.R., 47 All., 381.

(2) (1928) I.L.R., 50 All., 776.

counsel for the parties before us that a particular purchase which involves the mortgaging of the family property may in very special circumstances amount to a legal necessity. For example, there may be a small patch of land situate inside a larger area owned by the family and the owner of that patch of land may be a constant source of trouble to the family. In the circumstances the purchase may be justified. We need not express any opinion on a hypothetical case. It is sufficient to say that each case will have to be judged on its own merits, and, on the law as it stands, we are of opinion that this particular transaction cannot be upheld and that the appeal must fail as regards this point.

The learned counsel for the appellants prayed that we might remit the case for further inquiry to the lower court. The ground of his prayer was that when the learned Subordinate Judge decided this suit the appellants did not adduce evidence on the merits, necessity, and financial advantages of the transaction, because the case of *Shankar Sahai v. Bechu Ram* (1), was sufficient for the purpose. It was argued that the plaintiffs might have, in view of the Full Bench case of *Jagat Narain* (2), led evidence to show that there did exist circumstances which justified the father and the son to make the purchase by the pre-emption suit, but we find that no such ground was taken in the memorandum of appeal, and we are also of opinion that a remand of an issue is likely to encourage the parties to adduce false evidence. We therefore cannot accede to this request.

For the plaintiffs appellants it was then contended that in any case the amount of Rs. 1,800 and Rs. 550 ought to come out of the pre-empted property. As to this there can be no doubt. The minor members of the family repudiate the transaction of the purchase of the

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(1) (1925) I.L.R., 47 All., 381.

(2) (1928) I.L.R., 50 All., 969.

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pre-empted property. In the circumstances they cannot possibly object to a mortgage by Sewak Ram and Raghunath Singh of the property which they had acquired by pre-emption.

[The rest of the judgement, not being material to this report, is omitted.]

*Decree modified.*

*Before Mr. Justice Sulaiman and Mr. Justice Kendall.*

1928  
Novem-  
ber, 15.

AMARJIT UPADHIYA (DEFENDANT) v. ALGU CHAUBE (PLAINTIFF).\*

*Hindu law—Stridhan—Inheritance—Daughter's daughter preferential heir over daughter's son.*

A daughter's daughter is a preferential heir, as against the daughter's son, to *stridhan* property left by their maternal grandmother, in cases where their mother predeceased her own mother. *Subramanian Chetti v. Arunachelam Chetti* (1), followed. *Sheo Shankar Lal v. Debi Sahai* (2), distinguished.

THE facts material to this report were briefly as follows:—The plaintiff claimed to be the heir to certain property which was the *stridhan* of his maternal grandmother, Musammam Gomta. During the trial of the suit it transpired that the plaintiff had two sisters living. It was also established that the plaintiff's mother, Musammam Reshma Kuar, had predeceased her own mother, Musammam Gomta. The trial court having decreed the suit, there was an appeal to the High Court.

Mr. A. Sanyal, for the appellant.

Maulvi Iqbal Ahmad and Pandit Narmadeshwar Prasad Upadhiya, for the respondent.

\* First Appeal No. 107 of 1925, from a decree of Mathura Prasad, Subordinate Judge of Azamgarh, dated the 28th of January, 1925.  
(1) (1904) I.L.R., 28 Mad., 1. (2) (1903) I.L.R., 25 All., 468.

SULAIMAN and KENDALL, JJ. :—[After setting forth the facts the judgement continued.]

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It is not disputed before us that the plaintiff's mother, Musammat Reshma Kuar, had predeceased her own mother. It follows that on the date when Musammat Gomta died she left property which had been her *stridhan* property. Chapter 2, section 11, paragraphs 15 and 18, of the Mitakshara make it quite clear that to a *stridhan* estate daughters' daughters have preference over daughters' sons.

The learned advocate for the respondent has relied on the case of *Sheo Shankar Lal v. Debi Sahai* (1). In that case daughters' sons were given preference over a daughter's daughter. That case, however, is clearly distinguishable. On the death of the female whose *stridhan* was in dispute, her daughter had first succeeded and it was a dispute between the grandsons and the granddaughters of the *stridhan* owner after the death of the daughter. Their Lordships of the Privy Council held that property which a woman has taken by inheritance from a female is not her *stridhan*, and that *stridhan* when once it has descended to a female ceases to be *stridhan*. The sons got the property because it had ceased to be *stridhan* in the hands of their mother. In the case before us the property never descended from one female to another, and therefore did not cease to be *stridhan*. It must accordingly go to the *stridhan* heirs of Musammat Gomta. Those heirs are her daughter's daughters in preference to her daughter's son. This view has been accepted in Madras in *Subramanian Chetti v. Arunachelam Chetti* (2) and the ground on which the Privy Council decision has been distinguished by the Madras High Court has been accepted by this Court in several cases. In the presence of his sisters who are entitled to

(1) (1903) I.L.R., 25 All., 468.

(2) (1904) I.L.R., 28 Mad., 1.

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succeed to this property the plaintiff has no *locus standi* to sue. His sisters may sue hereafter.

We accordingly allow this appeal and, setting aside the decree of the court below, dismiss the plaintiff's suit.

### REVISIONAL CIVIL.

Before Mr. Justice Sulaiman.

1928  
Novem-  
ber, 16.

BANSI RAM AND OTHERS (PLAINTIFFS) v. B. N.-W. RAILWAY AND ANOTHER (DEFENDANTS).\*

*Railway—Risk-note form A (as amended)—“Loss arising from the same”—Interpretation—Goods insecurely packed—Shortage in weight at destination—Burden of proof.*

A consignment consisting of three bundles of corrugated iron sheets was despatched over a railway. As the consignment was defectively packed, a risk-note in form A (as amended) was executed by which the consignor agreed to hold the railway “harmless and free from all responsibility for the condition in which the aforesaid goods may be delivered to the consignee at destination and for any loss arising from the same except upon proof that such loss arose from misconduct on the part of the railway administration’s servants.” At destination the consignment was found to be short in weight by over two maunds. In a suit for damages against the railway: *Held*, that the expression “loss arising from the same” meant “loss arising from the condition in which the goods are delivered,” that a shortage in weight is a condition in which the goods are delivered and is covered by the saving clause, and that the burden lay on the plaintiff to prove the exception, i.e., misconduct of the railway’s servants.

THE facts of the case are fully set forth in the judgment of the Court.

Pandit Ambika Prasad Pandey, for the applicants.  
Mr. B. Malik, for the opposite parties.

\*Civil Revision No. 205 of 1928.

SULAIMAN, J. :—This is a revision from a decree of the Court of Small Causes dismissing the plaintiffs' suit for damages against the defendant railway company. A consignment consisting of three bundles of corrugated iron sheets was despatched from Calcutta to Deoria. Its weight as noted at Calcutta was 8 maunds, 4 seers. The consignment when weighed at its place of destination was found to be 2 maunds, 7 seers short in weight. The plaintiffs took delivery under protest.

The court below has dismissed the claim, holding that the plaintiffs have failed to prove wilful negligence of the defendant or misconduct of the servants of the defendant.

The risk-note which has to be considered is in form A, as recently amended. It is used when articles are tendered for carriage which are either already in bad condition or so defectively packed as to be liable to damage, leakage or wastage in transit. The consignor admitted that the goods were in such condition and agreed to hold the railway company "harmless and free from all responsibility for the condition in which the aforesaid goods may be delivered to the consignee at destination and for any loss arising from the same except upon proof that such loss arose from misconduct on the part of the railway administration's servants." It is not now open to the plaintiffs to urge that the consignment was neither in bad condition nor defectively packed. There is no doubt that the railway company is not liable for the condition in which it was delivered or from any loss arising from the same except on proof of the misconduct of the company's servants.

The learned advocate for the applicants has argued that the burden was on the railway company to prove that the loss arose on account of leakage, damage or wastage in transit. His contention is that the company has

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failed to prove that the shortage in weight was due to any such cause.

In my opinion the expression "loss arising from the same" means "loss arising from the condition in which the goods are delivered." The Urdu translation of this contract, though not conclusive, also supports the view that the word "same" refers to the noun "condition." It seems to me that a shortage in weight is a condition in which the goods are delivered and is covered by the saving clause. When a bundle is insecurely packed, any goods comprised in it may slip out and be lost on the way. There can be no necessary inference that it has been stolen, much less that it has been stolen by a servant of the railway company concerned. The question of wilful negligence did not really arise on the terms of the agreement; but that of misconduct on the part of the company's servants did arise. The burden lay on the plaintiffs to prove the exception, and the finding of the court below is that they have failed to discharge that burden. There is no proof that the loss of some of the sheets was due to any misconduct on the part of the railway servants.

I accordingly dismiss the revision with costs.

## REVISIONAL CRIMINAL.

Before Mr. Justice Dalal.

EMPEROR v. BANARSI DAS AND ANOTHER.\*

1928  
Novem-  
ber, 19.

*Criminal Procedure Code, sections 443, 446—Complaint by Indian against an European and some Indians jointly in a warrant case—Magistrate holding chapter XXXIII applicable—Section 446 mandatory—Jurisdiction—Magistrate cannot try the Indians after discharging the European.*

Where a Magistrate decided under section 443 of the Code of Criminal Procedure that a case ought to be tried under the provisions of chapter XXXIII, and the case, in which an European and some Indians were the co-accused, was a warrant case, and subsequently the Magistrate discharged the European accused, apparently on insufficient grounds, and proceeded to take up the case against the Indians: *Held*, the provisions of section 446 of the Code are mandatory and a Magistrate, after once deciding under section 443 that chapter XXXIII is to apply, cannot assume jurisdiction to try the case by discharging the European accused; he must, if he does not discharge the Indian accused persons under section 209 or section 253, commit them for trial to the court of sessions.

THE facts of the case appear from the judgement of the Court.

Babu Sailanath Mukerji and Pandit Rama Kant Malariya, for the applicants.

The Government Advocate (Pandit Uma Shankar Bajpai), for the Crown.

DALAL, J.:—An Indian, a police constable, was complainant in this case and one of the accused was a European of the name of Mr. Marshall. In the first complaint Mr. Marshall was made the principal offender. On an application by him the Magistrate recorded a

\* Criminal Revision No. 801 of 1928, from an order of A. Monro, District Magistrate of Cawnpore, dated the 27th of September, 1928.



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finding under section 443 (1) of the Code of Criminal Procedure that the case was one which ought to be tried under the provisions of chapter XXXIII. Subsequently the Magistrate, by an exceedingly summary order, discharged Mr. Marshall on the 18th of September, and assumed jurisdiction himself to try the Indians who were prosecuted along with Mr. Marshall. Under section 446 of the Code of Criminal Procedure, where a Magistrate decides under section 443 that a case ought to be tried under the provisions of chapter XXXIII, and the case is a warrant case, the Magistrate inquiring into the case shall, if he does not discharge the accused under section 209 or section 253, commit the case for trial to the court of sessions, whether the case is or is not exclusively triable by that court. The provisions of that section are mandatory and a Magistrate, after once deciding that he had no jurisdiction, cannot assume jurisdiction by discharging the European British subject. In the present case it is obvious to me that the discharge was made in order to assume jurisdiction. [The judgement then referred to certain facts and continued.]

The order discharging Mr. Marshall is not before me for revision, but I mention these facts to indicate that the Magistrate has gone out of his way to assume jurisdiction by discharging Mr. Marshall on insufficient grounds. I do not think that the wording of section 446 permits of such an assumption of jurisdiction. The Magistrate is empowered only to hold an inquiry in this case and if he does not discharge the Indian applicants, Banarsi Das, Ram Chandra, Sukh Lal, Jugal Kishore and Joti Swarup, he is bound to commit them to the court of sessions and he is hereby directed to do so if he does not discharge them.

*Before Mr. Justice Dalal.*

EMPEROR *v.* SHANKAR SINGH AND OTHERS.\*

Act No. V of 1861 (Police Act), section 30—*Regulation of music in the streets at festivals and ceremonies*  
—*Extent of regulation—Total prohibition of such music*  
—*Indian Penal Code, section 188.*

1928  
Novem-  
ber, 20.

The powers given to the police by section 30(iv) of the Police Act to regulate the extent to which music may be used in the streets on the occasion of festivals and ceremonies do not extend to the passing of an order that no crowds attended by music shall pass within the inhabited parts of a particular city during the Holi. A total prohibition is not covered by the word "regulate."

THE facts material for the purpose of this report appear from the judgement of the Court.

Mr. Nehal Chand and Munshi Sarkar Bahadur Johari, for the applicants.

The Assistant Government Advocate (Dr. M. Wali-ullah), for the Crown.

DALAL, J. :—[A portion of the judgement, not material for the purpose of this report, is here omitted.]

The Superintendent of Police of Moradabad issued an order under section 30 of Act No. V of 1861 during the Holi of this year, on the 3rd of March, 1928, that no crowds attended by music shall pass within the inhabited parts of the city. There is a finding of fact that the large number of applicants whose case is before me in revision did pass through a locality in the Moradabad city known as Katghar during the Holi in a procession accompanied with music. The applicants have been convicted and fined under section 188 of the Indian Penal Code for disobeying an order promulgated by a public servant lawfully empowered to promulgate such order. The lawful authority of the Superintendent of Police in

\* Criminal Revision No. 581 of 1928, from an order of Raghunath Prasad, Sessions Judge of Moradabad, dated the 7th of July, 1928.

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v.  
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SINGH.

Moradabad to issue the notification of the 3rd of March, 1928, is impugned here. There are two questions for decision : (1) Whether the officer was so empowered under section 30 of the Police Act, and (2) whether he was so empowered by a notification of Government, dated the 18th of May, 1877. The District Magistrate was of opinion that prohibition of music was covered by the authority given to the District Superintendent of Police under section 30 of the Police Act to regulate the extent to which music may be used in the streets on the occasion of festivals and ceremonies. I do not agree with the District Magistrate that a prohibition of every kind of music would be covered by the word "regulate." A power to regulate is given as regards some matter which is in existence, and it would be a misnomer to direct regulation of a thing that does not exist. Regulation of traffic, for instance, assumes the existence of traffic. That would not empower the police to confine every citizen to his house and prohibit all traffic. Under section 31 of the Police Act the police are empowered to keep order on public roads and in the public streets, thoroughfares, *ghats* and landing places and at all other places of public resort. In Benares in pursuance of this authority an order was issued that a certain class of people, the *Jatrawalas*, that is, people who take charge of pilgrims to the sacred city, were prohibited from visiting a railway station. In that case a learned Judge of this Court held that it was not competent to the Superintendent of Police to issue a general order forbidding persons of a certain class to frequent certain specified places, on the strength of his authority to keep order in a public place. The reasoning was the same as here : *Emperor v. Krishna Lal* (1). The keeping of order did not imply the confining of people to their own houses so that no need may arise for the keeping of order.

(1) (1916) I.L.R., 39 All., 131.

I have studied the notifications. [The judgment then dealt with the question whether a certain Notification of Government, dated the 18th of May, 1877, was still in force, and decided it in the negative.]

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SINGH.

There is, therefore, no power left with the Superintendent of Police of Moradabad to deal with music in streets during festivals and ceremonies independently of the authority given to him under section 30 (iv) of the Police Act.

I accept the reference of the learned Sessions Judge, set aside the conviction and sentence, and order the fine, if any recovered, to be refunded.

#### REVISIONAL CIVIL.

*Before Mr. Justice Sulaiman.*

KALI PRASAD (DEFENDANT) v. PARMESHWAR PRASAD  
(PLAINTIFF).\*

1928  
November, 26

*Act No. IX of 1908 (Limitation Act), section 5, article 163—Civil Procedure Code, order IX, rule 4—Application for restoration—Extension of time—Jurisdiction.*

Section 5 of the Limitation Act does not apply to an application under order IX, rule 4, of the Civil Procedure Code for restoration of a suit dismissed for the plaintiff's failure to pay process fee, and the court has no jurisdiction to extend the 30 days' limitation fixed by article 163 of the Limitation Act for such an application.

THE facts of the case fully appear from the judgement of the Court.

Munshi Sri Narain Sahai, for the applicant.

The opposite party was not represented.

SULAIMAN, J. :—This is a defendant's application in revision from a decree of the Court of Small Causes.

\* Civil Revision No. 222 of 1928.

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KALI  
PRASAD  
v.  
PARMESEH-  
WAR  
PRASAD.

The suit had been adjourned on several occasions on account of the non-payment of process fee by the plaintiff. On the 7th of December, 1927, the court dismissed the suit for the plaintiff's default of the payment of the process fee. The expression used by the learned Judge was "thrown out for plaintiff's default." On the 13th of February, 1928, the plaintiff applied under order IX, rule 4, of the Code of Civil Procedure for the setting aside of the dismissal. The report of the office also indicated that the suit had been dismissed on account of the non-payment of the process fee. On the 24th of February, 1928, the suit was restored to its original number on the file and on that date the process fee was paid by the plaintiff. Although the language used by the Judge of Small Cause Court was not explicit, there is no doubt that the suit was dismissed on account of the non-payment of the process fee. The plaintiff himself treated the dismissal as such, because he applied under order IX, rule 4. The application for restitution of the case was filed more than 30 days after the date of the dismissal, and was beyond time under article 163 of the Limitation Act.

The only point that remains for consideration is whether the time could be extended by the court under section 5 of the Limitation Act. That section does not apply to all applications, but only to those that are expressly provided for therein. It applies to an application for a review of judgement or for leave to appeal or any other application to which this section may be made applicable by or under any enactment for the time being in force. The application in question was made under order IX, rule 4, and there is no express provision in that order which makes section 5 applicable to such applications, as for instance is to be found in order XXII, rule 9, sub-clause (3).

I must, therefore, hold that the court had no jurisdiction to extend the period of 30 days which had expired

A somewhat similar view has been expressed by the Rangoon High Court in *Ma Naw Naw v. Somasundram Chetty* (1), with regard to applications under order IX, rule 13, of the Code of Civil Procedure which are governed by article 164.

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v.  
PARMESH-  
WAR  
PRASAD.

I accordingly allow this revision and setting aside the decree of the court below dismiss the plaintiff's suit with costs.

### REVISIONAL CRIMINAL.

Before Mr. Justice Boys and Mr. Justice Banerji.

EMPEROR v. BHAGAT RAM.\*

*Criminal Procedure Code, section 133—Removing a trade or occupation—Borrow-pits dug for brick-making—Order to cease the brick-making, and also to fill up the existing pits—Legality of latter part of order.*

1928  
Novem-  
ber, 26.

Where a Magistrate passed an order under section 133 of the Code of Criminal Procedure to stop a trade or occupation of brick-making which was going on in a particular locality, on the ground that it was injurious to the health or physical comfort of the community inasmuch as the borrow-pits made for the purpose of brick-making became breeding-grounds for mosquitoes, and also to fill up the existing pits and restore the *status quo*: Held, that the power "to remove" any trade or occupation, conferred by section 133, did not cover such an order to restore the *status quo* by filling up the existing pits.

THE facts of the case are fully stated in the judgment of the Court.

Babu Piari Lal Banerji, and Babu Saila Nath Mukerji, for the applicant.

The Assistant Government Advocate (Dr. M. Waliullah), for the Crown.

\*Criminal Reference No. 367 of 1928.  
(1) (1924) I.L.R., 2 Rangoon, 655.

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RAM.

BOYS and BANERJI, JJ. :—This is a reference from the Sessions Judge of Moradabad. We are now at the 26th of November, 1928, and these proceedings have dragged along from the 22nd of December, 1925, very nearly three years. This has been almost entirely due to the fact that the Joint Magistrate of Moradabad in February, 1926, passed at the outset an order directing the opposite party to cease excavating and burning bricks, and to fill up the existing pits, without taking the trouble to read the section under which he had to proceed. The result was that this Court set aside the proceedings, and a fresh notice had to issue. This notice was issued on the 1st of April, 1926, by Mr. Sayid Abu Mohammad, again a Magistrate of the first class, who did not take the trouble to see that the notice he issued conformed to the terms of one or other of the paragraphs in section 133. The result of this omission of both courts to be precise as to the law under which they were proceeding has led to much waste of time and trouble, and has also made it very difficult for us in this Court to know whether the orders eventually passed were such as we ought to uphold.

We do not propose to detail the whole of the subsequent procedure.

The substance of the complaint against Mr. Bhagat Ram, a civil engineer, is that he, having bought some land for the purposes of brick kilns just outside the municipal limits of Moradabad, proceeded to dig pits in the ordinary course of the trade or occupation of brick-making, and that those pits constituted a breeding ground of mosquitoes; and further that the smoke and the sparks from the chimneys constituted a nuisance and a danger. The Magistrate ordered the making of bricks to cease and the pits to be filled up. We have no information before us as to when the digging of the pits began, how much of the excavations had been made before the first notice

was served on Mr. Bhagat Ram, and how much subsequently. But this latter matter would only concern this Court as influencing the exercise of discretion. We have first to make it clear under what paragraph of section 133 these proceedings would apparently fall. There is no suggestion before us that any nuisance that may have occurred occurred on "any way, river or channel which is or may be lawfully used by the public, or on any public place." It is contended that the circumstances are covered by the second paragraph; that we have here a trade or occupation injurious to the health or physical comfort of the community. We have to see what order the Magistrate could pass in such circumstances. He could order the opposite party "to desist from carrying on, or to remove, or regulate in such manner as may be directed, such trade or occupation."

It is, of course, possible to suggest that power to order the "removal" of a trade must be held to include power to remove anything connected with that trade, or to restore the *status quo* before that trade commenced. But we do not think that that is the natural and straightforward meaning of the paragraph, and we have no right to strain the natural and straightforward meaning merely because an order that might be passed by so doing would possibly be very desirable. The powers given clearly suggest three different things: that the Magistrate may simply order the opposite party to stop carrying on the trade or occupation in question; he may think on the other hand that the carrying on of the trade or occupation would not be injurious if it were removed perhaps a short distance away, and he may order it to be so removed; or, thirdly, he may think that there will be nothing injurious if the occupation or trade is carried on at the same spot, provided certain conditions are fulfilled. We think that it would be manifestly straining the meaning of the word "remove" to hold that removal of the trade or

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occupation includes ordering the opposite party to restore the *status quo* in the manner now in this case considered by the authorities desirable. The only power given to the Magistrate,—we are speaking only of the circumstances of a case similar to this,—in reference to an excavation is to order it to be fenced. If there were any question of a nuisance on a public way, coming under the first paragraph of section 133, the power of the Magistrate might or might not include power to fill up a pit which was causing such nuisance. That we have not to decide.

We are not prepared to hold that where there is a case, as in the present, of a person being ordered to desist from a particular trade or occupation, or to remove that trade or occupation, or it is desired to regulate that occupation, the Magistrate has any power to order him to fill up the pits.

We have, of course, not failed to appreciate the grave danger said to arise to the inhabitants in the neighbourhood of these pits and the desirability of there being some such power in a suitable authority to control the commencement and conduct of these brick-making concerns. We entirely agree with the remark of Mr. Kidwai in the order of the 10th of February, 1926, in which he made an abortive effort to control this brick-kiln, that “it is a great pity that there are no bye-laws of the District Board which could at the very commencement put a stop to the starting of such works within so close a distance of habitations.” Mr. Kidwai himself seems to have felt the desirability of more explicit powers existing in somebody. We agree. But that would not justify us in straining the language of section 133 to meet the case.

Another observation which we must make is that even if the Magistrate had the power to order the filling

up of the pits, it is open to doubt whether in the circumstances of this case it would have been a proper order. Mr. Abu Mohammad in his order of the 3rd of June, 1926, the present order, the propriety of which we are now considering, says: "In the case of the railway borrow-pits, of which the existing pond (that is, a railway pond, other than the borrow-pits now in dispute) is a tangible monstrous example, the railway authorities have had their attention drawn to the desirability of filling them up some years ago, but the task has become too stupendous to be feasible." The meaning of this can only be that the railway having once been allowed to make these borrow-pits, it would not be reasonable or practicable to order the railway to fill them up. It would be perhaps even more unreasonable to order Mr. Bhagat Ram, a private individual, to fill up pits which he has been allowed to make. If we had any evidence before us as to how far he had proceeded with the making of these pits after notice that it might involve him in trouble, other considerations might apply; but we have no such information.

The order of the Magistrate directing the cessation of the brick-making and of digging pits will stand, but that portion of his order directing the opposite party to fill up the pits is set aside.

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## APPELLATE CIVIL.

Before Mr. Justice Sulaiman and Mr. Justice Kendall.

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BANK OF UPPER INDIA, LIMITED (IN LIQUIDATION)  
(PLAINTIFF) v. FANNY SKINNER AND OTHERS  
(DEFENDANTS).\*

*Act No. IV of 1882 (Transfer of Property Act), section 54—  
Act No. X of 1897 (General Clauses Act), section 3,  
clause (25)—“Immoveable property”—Mortgagee's in-  
terest under a simple mortgage—Assignment of mort-  
gagee's interest without registered document—Estoppel.*

The interest of a simple mortgagee is immoveable property, as defined by the General Clauses Act, 1897, and within the meaning of the provisions of the Transfer of Property Act; and a transfer of such interest can only be effected by means of a registered instrument, as required by section 54 of the Transfer of Property Act.

The parties to an arrangement for the assignment of such an interest by the one to the other without the execution of a registered instrument may, where the arrangement is carried out and acted upon, themselves be estopped from going behind it, but that arrangement cannot be effective as a legal transfer so far as third parties are concerned.

*Mutsaddi Lal v. Muhammad Hanif (1), Paresh Nath Singha v. Nabogopal (2) and Nataraja Iyer v. The South Indian Bank of Tinnevely (3), referred to. Abdul Majid v. Muhammad Faizullah (4), Karim-un-nissa v. Phul Chand (5) and Lal Umrao Singh v. Lal Singh (6), distinguished.*

THE facts of the case are fully stated in the judgment of the Court.

Mr. B. E. O'Connor and Munshi Ram Nama Prasad, for the appellant.

Dr. Kailas Nath Katju and Babu Surendra Nath, Gupta, for the respondents.

\* First Appeal No. 278 of 1926, from a decree of J. N. Mushran, Subordinate Judge of Meerut, dated the 18th of February, 1926.

(1) (1912) 10 A.L.J., 167.

(2) (1901) I.L.R., 29 Cal., 1.

(3) (1911) I.L.R., 37 Mad., 51.

(4) (1890) I.L.R., 13 All., 89.

(5) (1893) I.L.R., 15 All., 134.

(6) (1924) I.L.R., 46 All., 917.

SULAIMAN and KENDAL, JJ. :—This is a plaintiff's appeal arising out of a suit for sale on the basis of a mortgage-deed, dated the 8th of December, 1911, executed by defendant No. 1 in favour of the Bank of Upper India. In the original written-statement which was filed by the principal contesting defendant on the 17th of July, 1924, she raised various pleas including a denial of proper execution, receipt of consideration as well as some other pleas. But there was no plea that the plaintiff Bank had no *locus standi* to sue through its liquidator. On the 10th of November, 1925, she filed an application stating that she had just come to know that the Bank of Upper India had sold all its assets and liens to the Trust of India and that accordingly the plaintiff had no right left to sue the defendant. In spite of objections the court considered that this was a legal plea and framed an additional issue, No 8. All the other issues have been found in favour of the plaintiff, but the suit has failed on the ground that the assets of the Upper India Bank had been transferred to the Trust of India, Limited, and the plaintiff Bank cannot maintain the suit. The finding on the last mentioned issue is the only point which has been discussed before us by the learned counsel for the parties.

The principal facts of this case cannot be disputed. The Bank of Upper India suspended payment sometime about October, 1914. In 1915 an application was presented under section 153 of the Indian Companies Act, putting forward a compromise before the High Court for approval. On the 2nd of June, 1915, TUDBALL, J., sanctioned a scheme under which the shareholders were to surrender their shares and receive in exchange debentures in the Trust of India, on certain conditions. Later, on the 28th of February, 1917, that scheme was slightly modified and the learned Judge accepted the modification. The true banking business of

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the Bank of Upper India was to be absorbed and taken over by the Alliance Bank of Simla and that portion of the Bank's business which was not true banking was to be taken over by a company called the Trust of India, Limited. In lieu of their shares the shareholders were to be offered debentures in the Alliance Bank and preference shares in the Trust of India, Limited, on certain terms. It is not necessary to specify the scheme in any detail.

On the 30th of June, 1917, the shareholders of the Upper India Bank at their meeting resolved that the company should be wound up voluntarily, and Messrs. Hunter and Stuart be appointed liquidators for its winding up, with joint and several powers. It was further resolved that a draft agreement with the Trust of India, Limited, should be approved, and the liquidators be authorized pursuant to section 213 of the Indian Companies Act of 1913 to enter into the said agreement with the Trust of India, Limited, in terms of the said draft, and to carry the same into effect with such if any modifications, as they may think expedient. Subsequently the Alliance Bank of Simla and the Trust of India, Limited, also went into liquidation. Presumably with a view to evade the payment of stamp duty to Government, the liquidators of the Upper India Bank and those of the Alliance Bank and the Trust arrived at some mutual and private understanding that the debentures and the preference shares should be offered to the shareholders of the Upper India Bank and that the assets of the latter Bank be taken over by the liquidators of the Alliance Bank and the Trust. As to documents which were outstanding the understanding was that the liquidators of the Upper India Bank should realize the same and pay over the amount realized to the other liquidators. The oral evidence in this case leaves no doubt that this mutual arrangement has been carried out to a very great extent,

and that as between these two sets of liquidators there has been absolutely no breach of contract so far. But it is also an admitted fact that the liquidators of the Upper India Bank have not executed any proper registered document transferring their interests in the immoveable properties in favour of the other liquidators. At any rate it is admitted in this case that no registered document transferring the rights under the mortgage in suit has been executed by the liquidators of the plaintiff Bank. The learned Subordinate Judge, relying principally on a judgement of the High Court in a previous proceeding,\* has come to the conclusion that the assets of the Bank have all been legally transferred to the Trust of India. In that case the question arising in the present appeal did not directly arise. The learned Subordinate Judge has quoted expressions used by WALSH, J., as to the taking over of the assets of the Bank of Upper India, the transactions having been carried through, the shareholders of the Bank of Upper India having surrendered their shares in exchange for debentures and preference shares and the due execution and performance of the agreement for sale. There is a further remark in his judgement to the effect that "the exchanges have been made, the matters have passed into history and the legal rights of the parties have been settled without the necessity of a formal document". RYVES, J., however, confined his judgment exclusively to the question of estoppel and remarked: "It may be that the parties *inter se* are estopped from disputing the transfer although in law no valid transfer has taken place so far as immovable properties or securities on such immoveable properties of over Rs. 100 in value are concerned." The defendant not being a party to that proceeding, it is not suggested that that judgement operates as *res judicata*. As the question at that time was principally one of estoppel, we

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do not think that it was at all decided in that case that a valid transfer of all the immoveable properties had been legally effected.

If no registered document is required for the transfer of the mortgagee's interest under a simple mortgage-deed, and an oral assignment is effective, then there would be no doubt that the plaintiff Bank has parted with its interest in this mortgage by virtue of the arrangement with the liquidators of the other company. On the other hand, if no valid transfer can take effect without a registered document, it is clear that although the parties to the arrangement may themselves be estopped from going behind it, that arrangement cannot be used as transferring legal title to the Trust when a stranger, who is not a party to that agreement, wishes to take advantage of it.

Section 17, sub-clause (b), of the Registration Act makes "all non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of Rs. 100 and upwards, to or in immoveable property" compulsorily registrable. It is obvious that if a sale-deed of the mortgagee's interest had been executed it would have required registration inasmuch as it would have affected an interest in immoveable property. But, strictly speaking, section 17 requires registration only when a transaction has been reduced to writing. It does not in terms lay down that no transfer can take effect in the absence of such document. We have to fall back upon the provisions of the Transfer of Property Act to see whether to effect a valid transfer a registered instrument is necessary. Section 58, clause (a), makes it quite clear that a mortgage is a transfer of an interest in immoveable property. Then section 54 provides that a transfer of tangible immoveable property of the value of Rs. 100 and



over or other intangible thing can be made only by a registered instrument. The question remains whether the mortgagee's interest is itself immoveable property within the meaning of section 3. That section, however, does not give a complete definition of immoveable property. For that we have to refer to its definition in the General Clauses Act (Act No. X of 1897) clause (25), where it is laid down that immoveable property shall include land, benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth. Even that definition on its own language is not exhaustive. A subtle distinction has sometimes been drawn between an interest in the immoveable property and the immoveable property itself. And on the basis of such a distinction the learned advocate for the respondent has urged that although a mortgagee's interest is an interest in immoveable property it is not immoveable property itself, and therefore a transfer of it does not require a registered deed. We are unable to accede to this contention.

In the first place a mortgagee's interest may come in within the meaning of the expression "benefits to arise out of land" in the General Clauses Act. In the second place, the Indian legislature appears to have intended that all rights to immoveable property should fall within the category of immoveable property. Mortgages of immoveable property have priority over all subsequent transfers and subsequent transferees are presumed to have notice of the previous charge. Such presumption cannot be made unless there is a registered document. It seems to be against the general policy of the Transfer of Property Act that subsequent transferees should be bound by a mortgage although that mortgage need not be made by a registered instrument. The mortgagee's interest is not a mere right to recover the debt due but to have a charge on the property and to follow it

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wherever it goes. His claim is excluded from the definition of actionable claim in section 3 of the Transfer of Property Act. We have therefore no hesitation in coming to the conclusion that a sale of a mortgagee's interest can only be effected by means of a registered deed of transfer.

CHAMIER, J., in the case of *Mutsaddi Lal v. Muhammad Hanif* (1), expressed the opinion that the interest of a simple mortgagee was an intangible thing within the meaning of section 54 and the transfer of it can be made only by a registered instrument. The Calcutta view also is that the mortgagee's interest is immoveable property even within the meaning of the provisions of the Civil Procedure Code: *Paresh Nath Singha v. Nabogopal* (2). The same view has been expressed in Madras: *Nataraja Iyer v. The South Indian Bank of Tinnevely* (3).

No doubt in numerous cases of this Court, for instance *Abdul Majid v. Muhammad Faizullah* (4), *Karim-un-nissa v. Phul Chand* (5) and *Lal Umrao Singh v. Lal Singh* (6), it has been held that a simple mortgagee's interest is not immoveable property within the meaning of that word as used in the Code of Civil Procedure. As the latter Code does not define immoveable property, the learned advocate for the respondent has urged that these cases must have proceeded on the definition of that word in the General Clauses Act, which definition applies to the case before us. But there are various provisions in the Code of Civil Procedure which make it impracticable to hold that the interest of the mortgagee can be attached and sold as immoveable property according to the procedure laid down for its sale. Those considerations influenced the learned Judges of this Court considerably. We do not therefore think

(1) (1912) 10 A.L.J., 167.

(3) (1911) I.L.R., 37 Mad., 51.

(5) (1893) I.L.R., 15 All., 134.

(2) (1901) I.L.R., 29 Cal., 1.

(4) (1890) I.L.R., 13 All., 89.

(6) (1924) I.L.R., 46 All., 917.

that these cases are any guide to us in the present case. The view expressed by us as above maintains a consistency between the policies of the Registration Act and the Transfer of Property Act, and is we think, the correct view.

No matter what the equities may be between the Bank of Upper India and the Trust of India, Limited, *inter se*, we must hold that no valid and legal transfer of the mortgagee's interest had taken place so as to deprive the present plaintiff of all rights to maintain the suit.

We accordingly allow this appeal and setting aside the decree of the court below decree the plaintiff's claim with costs in both courts. The usual six months are allowed for payment.

#### REVISIONAL CIVIL.

*Before Mr. Justice Sen and Mr. Justice Niamat-Ullah.*

JAGANNATH SAHU (PLAINTIFF) *v.* CHHEDI SAHU  
(DEFENDANT).\*

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*Civil Procedure Code, schedule II, paragraph 5—Arbitration—Appointment of fresh arbitrator when original arbitrator refuses to act—Procedure—Court appointing arbitrator on remuneration, without parties' consent—Civil Procedure Code, section 115—"Case decided"—Order appointing fresh arbitrator.*

The parties to a suit agreed to refer the dispute to the arbitration of a named arbitrator. An order of reference was made accordingly, but the arbitrator declined to act. The defendant then applied to the court that anyone out of nine persons nominated by him might be appointed as arbitrator. The plaintiff was no longer willing to have the case decided by an arbitrator and prayed that the arbitration be superseded. Thereupon the court appointed a certain person as arbitrator,

\*Civil Revision No. 181 of 1928.

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on payment of Rs. 100 by the parties in equal shares, although in the original agreement of reference there was no provision for any remuneration. The plaintiff expressed his unwillingness to make any payment, but the court insisted on its order.

*Held*, in revision, that the appointment of the arbitrator was not in compliance with the provisions of schedule II, paragraph 5, of the Code of Civil Procedure, and the court's order, summarily appointing the arbitrator and directing the parties to pay a remuneration, was without jurisdiction or at least tainted with material irregularity.

*Held*, also, that the order of the court, deciding the controversy between the parties as to whether the arbitration should be superseded or a fresh arbitrator should be appointed, was an order deciding a "case" within the meaning of section 115 of the Code of Civil Procedure and a revision lay.

THE facts of the case are fully set forth in the judgement of the Court.

Munshi Harnandan Prasad, for the applicant

Munshi Gadadhar Prasad, for the opposite party.

SEN and NIAMAT-ULLAH, JJ. :—This is an application for revision arising out of a suit brought by the applicant before the Subordinate Judge of Gorakhpur for a declaration of his right to certain property and impugning a sale-deed executed by him in favour of the defendant. On the 5th of May, 1928, parties agreed to refer their dispute to the arbitration of Babu Bhagwati Prasad, vakil. They moved the court for an order of reference, which was accordingly made. Babu Bhagwati Prasad, however, refused to act as arbitrator, and by an application, dated the 29th of May, 1928, the defendant nominated no less than nine persons, any one of whom he desired to be appointed as an arbitrator in place of Babu Bhagwati Prasad. The plaintiff was not willing to have the case decided by an arbitrator. He, therefore, prayed that the arbitration be superseded and the case tried before the court. The learned Subordinate Judge passed what appears to be a most extraordinary order. He appointed Babu Ganesh Prasad, vakil,

to act as arbitrator in place of Babu Bhagwati Prasad, on payment of Rs. 100 by the parties half-and-half. The plaintiff expressed his inability to make any payment. The court recorded an order dated the 5th of June, 1928, in these terms:—"The applicant will have to pay the fees, otherwise it will be recovered by attachment of his property." Aggrieved by the order of the Subordinate Judge insisting on the arbitration and on the payment of Rs. 50 by the plaintiff, the latter has applied in revision to this Court.

We are of opinion that the order of the learned Subordinate Judge cannot be sustained. That a court can appoint an arbitrator in certain circumstances is laid down by schedule II, paragraph 5, but this can only be done after certain formalities have been gone through by the party desirous of continuing the arbitration. Paragraph 5 provides:—"Where the parties cannot agree within a reasonable time with respect to the appointment of an arbitrator, or the person appointed refuses to accept the office of arbitrator . . . any party may serve the other party or the arbitrators, as the case may be, with a written notice to appoint an arbitrator . . ." "If, within seven clear days after such notice has been served or such further time as the court may in each case allow, no arbitrator . . . is appointed . . . , the court may, on application by the party who gave the notice, and after giving the other party an opportunity of being heard, appoint an arbitrator . . . or make an order superseding the arbitration, and in such case shall proceed with the suit." Having regard to these provisions, the order of the court, dated the 29th of May, 1928, referring the matter in dispute to the arbitration of Babu Ganesh Prasad, passed immediately on the application of the defendant who desired to continue the arbitration, was in our opinion without jurisdiction or at least tainted with material irregularity. It should be borne in

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mind that an arbitrator is a Judge chosen by the parties themselves and a court should not thrust an arbitrator on an unwilling party except under circumstances laid down in the rule quoted above. It is obvious that the plaintiff was no longer willing to proceed with the arbitration and in any case seriously objected to payment of any fee to the arbitrator. In the original agreement of reference arrived at between the parties there was no provision for any remuneration being paid to the arbitrator. We think that it was irregular, to say the least of it, that the learned Subordinate Judge not only made the summary appointment of an arbitrator, but also saddled the plaintiff with certain costs, which he could not be legally ordered to pay. If the learned Subordinate Judge felt that the services of a legal practitioner were necessary for the arbitration of the dispute before him and that no legal practitioner was willing to discharge the duties of an arbitrator without sufficient remuneration, his clear duty was to supersede the arbitration and proceed to try the suit himself.

The learned advocate who appears on behalf of the opposite party has raised a preliminary objection that an application for revision is incompetent. He maintains that no "case" within the meaning of section 115 of the Code of Civil Procedure having been decided by the court below, no revision lies. We think this contention is not sound. On the 29th of May, 1928, the controversy between the parties was whether the arbitration should be superseded or should be continued and another arbitrator appointed in place of Babu Bhagwati Prasad as desired by the defendant. The court settled that controversy by its order of that date, which directed that the arbitration should continue and appointed Babu Ganesh Prasad to act as arbitrator. The controversy thus terminated. We think that the order of the learned Subordinate Judge in that connection was

clearly an order deciding a case within the meaning of section 115 of the Code of Civil Procedure. We, therefore, overrule the preliminary objection.

In the view we take of the order, dated the 29th of May, 1928, of the lower court, this revision must succeed. The only question is whether we should quash the order and direct that the procedure laid down by schedule II, paragraph 5, of the Code of Civil Procedure be followed in making the appointment of a new arbitrator. Having regard to the circumstances of the case we do not think it desirable to prolong the matter any further. Since the defendant himself did not follow the procedure laid down by law and did not obtain the appointment of a new arbitrator in a regular manner, the better course is that the arbitration be superseded.

We, therefore, quash the order of the learned Subordinate Judge, dated the 29th of May, 1928, directing the appointment of Babu Ganesh Prasad to act as arbitrator in place of Babu Bhagwati Prasad and direct that the arbitration be superseded and the suit tried out by the court. The plaintiff applicant will have his costs of this revision.

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## APPELLATE CIVIL.

Before Mr. Justice Sen and Mr. Justice Niamat-Ullah.

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ber, 10.

RADHEY SHIAM (DEFENDANT) v. MEWA LAL AND  
ANOTHER (PLAINTIFFS.)\*

*Act (Local) No. IV of 1910 (United Provinces Excise Act)—  
Rules 80, 82, 86 of the Excise Manual—Act No. IX of  
1872 (Contract Act), section 23—Contract between licen-  
see and stranger to share profits and losses of the liquor  
business—Partnership—"Transfer or sub-lease of license."*

Where an agreement is entered into between a licensee and a third person, in consideration of money contributed by the latter, and the parties agree to share the profits and losses arising from the liquor business, the transaction does not amount to a transfer or sub-lease of the license or the liquor contract. Such an agreement does not contravene rules 80, 82 and 86 of the United Provinces Excise Manual or section 23 of the Indian Contract Act.

THE facts of the case sufficiently appear from the judgement of the Court.

Maulvi *Mushtaq Ahmad*, for the appellant.

Munshi *Kamlakant Verma*, for the respondents.

SEN and NIAMAT-ULLAH, JJ.:—This is a defendant's appeal in a suit for accounts instituted by Mewa Lal and Radhey Lal, the two sons of Lala Bharathji, against Babu Radhey Shiam. The defendant held a liquor contract from the Government for a period from the 1st of April, 1922, to the 31st of March, 1923. The license was issued solely and exclusively to Radhey Shiam. The plaintiffs came into court with the allegation that Radhey Shiam, the defendant, had taken Bharathji into partnership with him in the matter of profits and losses relating to the liquor shop, that a profit

\* Second Appeal No. 67 of 1927, from a decree of D. C. Hunter, District Judge of Allahabad, dated the 16th of September, 1926, confirming a decree of Ramesh Bal Dikshit, Munsif of West Allahabad, dated the 24th of July, 1926.



of about Rs. 2,00 had been made in the said business in which the share of Bharathji came to half, and that Bharathji had received only Rs. 850 on account of his share. The suit was for the recovery of the amount due to Bharathji during the continuance of the contract.

A variety of pleas were taken in defence; but we are concerned only with one of them. It was pleaded that the contract entered into between Radhey Shiam and the plaintiffs' father contravened the provisions of section 23 of the Indian Contract Act and that no claim under the said contract was enforceable by the sons of Bharathji. It is contended that the partnership with Bharathji amounted to a transfer or a sub-lease of the license and, as the license was purely personal to the grantee, the transferee or the sub-lessee or his legal representatives could not enforce a claim for the recovery of any benefit under such an agreement. Reliance was placed upon a certain number of rules contained in the Excise Manual of the United Provinces. These rules were manifestly made in accordance with the provisions of sections 40 and 41 of the United Provinces Excise Act (Act No. IV of 1910) and they have the force of law. It does not appear to us, however, that in admitting the plaintiffs' father into the benefits or into the obligations relating to the profits and losses of the business, the defendant in any way transgressed against rules Nos. 80, 82 and 86 of the Excise Manual. These rules provide that the licenses issued to liquor contractors are personal and that transfers and sub-leases of these contracts are not permitted except with the sanction of the Collector. Where an agreement is entered into between the licensee and a third person, in consideration of money contributed by the latter, and the former agrees to give him certain benefits in the share of the profits arising from the

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business and the latter also takes upon himself the liability arising from losses accruing from the said business, it cannot be said that the transaction amounts to a transfer or sub-lease of the liquor contract. It has been held in *Shiam Bihari Lal v. Malhi* (1) that where a plaintiff in lieu of a pecuniary consideration enters into a contract with the defendant who had obtained a license relating to sale of contracts, and if there was profit the plaintiff was to get a certain percentage out of it and in case of loss he was to share the liability with the licensee, the contract did not constitute a transfer or a sub-lease by the licensee and was not illegal as being in violation of rule '82 made under the Excise Act. We are entirely in accord with this view, and we do not think that the agreement which is sought to be enforced by the present suit contravenes the provisions of section 23 of the Indian Contract Act.

A penal law has to be strictly construed, and should be interpreted generously in favour of the subject.

Reliance is placed upon the case of *Hormasji Motabhai v. Pestanji Dhanjibhai* (2). This was a decision with reference to section 45 of Act V of 1878 (Bombay Abkari Act). It has not been shown that the provision of the United Provinces Excise Act is *pari passu* with section 45 of the Bombay Abkari Act. Moreover we have not been shown that the restrictions placed under the Bombay Act have been adopted in the license issued under the United Provinces Excise Act.

We consider that this appeal is without force. We dismiss it with costs.

(1) (1916) 14 A.L.J., 1035.

(2) (1887) I.L.R., 12 Bom., 422.

Before Mr. Justice Sen and Mr. Justice Niamat-Ullah.

RAHIM BAKHSH (DEFENDANT) v. BACHCHA LAL  
(PLAINTIFF).\*

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December, 12.

*Defamation—Slander—Suit for damages—Imputation of dishonesty against tradesman—Special damage, whether necessary—Malice, whether necessary ingredient—Privilege—Defamatory remark interjected by counsel during examination of witness by another counsel—Costs, when allowable in full although claim only partially decreed.*

A complaint of cheating was brought by C against B, a partner in a trading firm, in respect of a transaction with the firm. During the trial C was asked in cross-examination by B's vakil whether B's firm was the biggest firm of grain dealers in the city, and C said yes. Thereupon R, the mukhtar who was appearing for C in the case, interjected the remark, audible to several persons in court, that B's firm were also the most dishonest people in the city. The case terminated in a dismissal of the complaints. B then sued R for damages for slander.

*Held*, that the distinction in English law between slander being actionable *per se* in certain cases and not being actionable in other cases without proof of special damage has not been recognized or followed with unanimity by the Indian High Courts. Even under the common law of England, slander or oral defamation is actionable in certain cases without proof of special damage, and one of such cases is where the plaintiff was affected by the words in his office, profession or trade. In such a case special damage, in the sense that actual and temporal loss has in fact occurred, need not be proved.

The remark interjected by the mukhtar was entirely uncalled for and could not be regarded as being either in furtherance of the interests of his client in the case or in the discharge of his professional duty towards his client, and could not in any sense be deemed to be privileged, and was actionable.

A malicious intent or an intent to damage the reputation of a person is not a necessary ingredient of actionable slander.

\* First Appeal No. 70 of 1926, from a decree of J. N. Dikshit, Subordinate Judge of Banda, dated the 27th of January, 1926.

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Costs of suit were allowed to the plaintiff in full, although he had valued his claim for damages at Rs. 5,100 and the court had allowed only Rs. 200, in the absence of evidence to establish either loss of trade or any other actual loss.

THE facts of the case fully appear from the judgement of the Court.

Maulvi *Iqbal Ahmad* and Mr. *T. A. K. Sherwani*, for the appellant.

Dr. *Kailas Nath Katju*, for the respondent.

SEN and NIAMAT-ULLAH, JJ. :—This is an appeal by the defendant from the judgement and decree of the Subordinate Judge of Banda in a suit for damages founded upon slander.

Plaintiff Bachcha Lal is a partner in the firm of Mulchand Ram Prasad, which carries on extensive business at Banda as commission agents and in the purchase and sale of grain. In 1924, one Chhedi Brahman had agreed to purchase from the plaintiff's firm through Bachcha Lal 200 bags of gram of a particular kind and quality and had paid Bachcha Lal Rs. 200 by way of earnest money. This transaction led to a criminal complaint, which was filed by Chhedi against Bachcha Lal under section 420 of the Indian Penal Code. The trial of the case was in progress and while the cross-examination of Chhedi was proceeding, Babu Kesho Chandra Singh, a vakil for Bachcha Lal, asked Chhedi, the complainant, whether the plaintiff's firm was the biggest arhatia firm for grain in the city or not. Chhedi answered that question in the affirmative. Rahim Bakhsh, who was a mukhtar for Chhedi in the criminal case and who was sitting close to Babu Kesho Chandra Singh, immediately upon hearing that answer by the complainant is said to have interjected the observation that "they were the most dishonest men also in the city." The original words were "*Bande men sab se bare be-iman hain.*" It

is said that Kesho Chandra Singh immediately protested and asked the Magistrate to make a record of this statement having been made by the defendant, but the Magistrate said that he had not heard the remark in question and did not record the same in his proceedings. Plaintiff alleges that the complaint of Chhedi was thrown out on the 21st of January, 1925, as false. It is not disputed before us that the complaint was dismissed.

Bachcha Lal instituted the suit which has given rise to the present appeal against Munshi Rahim Bakhsh, mukhtar, on the 9th of April, 1925, for recovery of Rs. 5,100 on account of damages sustained by him by the slanderous words uttered by Rahim Bakhsh in the court of the Magistrate. The defendant denies having uttered the words which are imputed to him. In the alternative he claims privilege.

The court below held on the evidence that the words imputed to the defendant were actually used by him and that the said words were of a defamatory character for which no privilege could be claimed by the defendants as a legal practitioner in the discharge of his duty to his client and therefore the action for slander was maintainable against the defendant. The court below gave the plaintiff a decree for Rs. 200 as damages, with proportionate costs and the defendant was directed to bear his own costs in the court below. In appeal before us, it has not been seriously contended that the words ascribed to the defendant were not uttered by him. In view of the evidence which was produced in the court below, consisting of the statement of Babu Kesho Chandra Singh, a gentleman of respectability and position, and the corroborative evidence of Gaya Prasad and Babu Prabhu Dayal, it was not possible for the court below to arrive at a different conclusion. We hold that the defendant did utter those words in the court of the Magistrate on the 6th of January, 1925, and that the said words

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were heard by Kesho Chandra Singh and certain other persons in the court room.

It has been contended that the words were not uttered with any malicious intent, that they were not actionable *per se* and that the defendant in his capacity of mukhtar in the case of Chhedi against the plaintiff was absolutely privileged and no suit was maintainable for damages against him by reason of his uttering those words.

The law in British India relating to civil liability in actions founded upon tort has not been settled by legislature. The English common law of tort is not applicable to India in its entirety and rules of English common law as enunciated or recognized by English courts ought not to be applied to this country with inflexibility without regard to the dissimilarity in the two countries with reference to their customs and usages, the state of society and the conditions of things to be found therein.

The common law of England has rarely been applied in deciding cases relating to slander outside the Presidency towns. In the absence of any statutory provision, suits for damages founded upon tort and more especially those which are based upon slander have to be decided according to the principles of justice, equity and good conscience and in the light of judicial principles to be found in the decisions of eminent English Judges and recognized jurists which are broad based upon human nature and common experience of mankind.

The distinction between slander being actionable *per se* in certain cases and not being actionable in other cases without proof of special damage has not been recognized or followed with unanimity by the Indian High Courts.

As a principle of equity, every man is entitled to have his reputation preserved intact; and any words

calculated to infringe this right afford a good cause of action. As was observed by MALINS, V. C., in *Dixon v. Holden* (1), a man's reputation is his property and if possible more valuable than other properties. Even under the common law of England, slander or oral defamation is actionable in certain cases without proof of special damage and one of such cases is where the plaintiff was affected by the words in his office, profession or trade. In such a case special damage, in the sense that actual and temporal loss has, in fact, occurred need not be proved: *Foulger v. Newcomb* (2). In *Dawan Singh v. Mahip Singh* (3) MAHMOOD, J., has laid down the following propositions:—

“(1) That whilst the English law of defamation recognizes no distinction between defamation as such and personal insult in civil liability, the law of British India recognizes personal insult conveyed by abusive language as actionable *per se* without proof of special or actual damage.

(2) That such abusive and insulting language, unless excused or protected by any other rule of law, is in itself a substantive cause of action and a civil injury apart from defamation.”

The words used by the defendant in this case which are the subject of dispute are not capable of being construed *mitiori sensu* and are indeed incapable of being interpreted in an innocent sense. The test is how will the words be understood by a man of ordinary intelligence where the person against whom the imputation is levelled is a merchant or a tradesman. The question that arises for determination is whether the words have a natural tendency to harm him in his occupation. The words uttered should not be taken out of the setting in view of the place, the occasion and the circumstance when the

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(1) (1869) L.R., 7 Eq., 488 (492). (2) (1867) L.R., 2 Ex., 327.

(3) (1888) I.L.R., 10 All., 425 (456).



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words were used. The defendant was the mukhtar of Chhedi in the case under section 420 of the Indian Penal Code. He is entirely within his rights to make any observation about the conduct, character or status of Bachcha Lal which might have been necessary or called for in the prosecution of the case which was then under inquiry. We have got to take into consideration the circumstance under which the words were used. The institution of a complaint under section 420 of the Indian Penal Code against a merchant of the respectability and position of Bachcha Lal was not only a serious menace to his liberty but it was by itself a circumstance calculated to prejudice his personal reputation as a man and his credit in the market. Babu Kesho Chandra Singh was trying to vindicate the character and position of his client Bachcha Lal. He put the question to the complainant as to whether or not the firm of which Bachcha Lal was a member was the biggest firm at Banda. The answer to that question was a categorical affirmative. The defendant Rahim Bakhsh was sitting in court very close to Babu Kesho Chandra Singh; the remark made by him that the firm of which Bachcha Lal was a member was also the most dishonest firm in Banda, was a remark which was entirely uncalled for. It was a remark singularly inopportune, because it was calculated to create an atmosphere of distrust about Bachcha Lal, about the time when his commercial honesty was itself a question in issue before a criminal court. It is significant that the remark was not addressed to the court. It could not be contended that the observation was made by Rahim Bakhsh in any way either in furtherance of the interests of his client in the case or in the discharge of his professional duty towards his client. The remark was evidently made for the illumination or edification of such of the persons who happened to be present in the court room in the immediate vicinity of Rahim Bakhsh. The learned

advocate for the appellant relies on *Munster v. Lamb* (1) in support of the proposition that the statement in controversy bore the seal of privilege and could not form the basis of a civil action. It was held in that case that "words spoken by an advocate *in the course of the defence of his client*, however defamatory they may be of the prosecutor, are not actionable, provided they be relevant to the matter in hand, and spoken in good faith. An advocate has been allowed very extensive latitude in the matter of the freedom of his speech before a court concerning the action in which he is employed." MATHEW, J., observes as follows (at page 594): "It may be inconvenient to individuals that advocates should be at liberty to abuse their privilege of free speech subject only to animadversion of punishment from the presiding Judge. But it would be a far greater inconvenience to suitors, if advocates were embarrassed or enfeebled in endeavouring to *perform their duty* by the fear of subsequent litigation. This consequence would follow, that no advocates could be as independent as those whose circumstances rendered it useless to bring actions against them. The passage in *Seaman v. Netherliff* upon which Mr. Waddy relied was not, it seems to me, intended to qualify the statement of the law contained in the earlier judgements relied upon by the defendant. All that was to be laid down was, that for defamatory statements made by an advocate *outside his office of advocate and with no reference to the subject before the court, and which therefore were necessarily made in bad faith and were irrelevant*, a counsel might be proceeded against in an action." These observations are a clear authority against the contention of the appellant. In the present case the words used by the defendant were not and could not in any sense be recognized as privileged and a suit for damages was clearly maintainable.

(1) (1888) 11 Q.B.D., 588.

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It is next contended that the words were not used with a malicious intent and therefore no suit for damages could be instituted against the defendant. In *Dawan Singh v. Mahip Singh* (1), MAHMOOD, J., observes (at page 456) that "malice is an element of liability for abusive and insulting language." With great respect, we are not prepared to subscribe to this proposition in its entirety. Malicious intent or an intent to damage the reputation of a particular person is not one of the ingredients of actionable slander. Bigelow, in his *Law of Torts*, second edition, 1903, page 151, observes as follows:—"The plaintiff in an action for defamation is entitled to recover upon proof of the publication (with special damage, if the case does not fall under one of the four heads); proof of malice, in other words, malice as an entity, is not necessary in any sense of the term to make a case. It has indeed been common to say that malice is presumed or implied upon proof of the publication, but that means nothing and is only misleading, for the presumption or implication cannot be overturned by evidence of want of malice. Malice touching to making a *prima facie* case is only a name arbitrarily applied; it is simply a fiction."

We are in complete accord with this view. The law in this respect has been clearly enunciated by Sir Hugh Fraser in his *Principles and Practice of the Law of Libel and Slander*, 6th edition, 1925, at page 62: "It is no defence that the defendant did not *intend* to refer to, or defame, the plaintiff; and the defendant will not be excused merely because he published the words complained of in the honest belief that they were true, unless the occasion of publication was one of qualified privilege or without negligence (unless he took only a subordinate part in such publication and was not the author, printer or original publisher of the words), or by accident or

(1) (1888) I.L.R., 10 All., 425.

mistake or in jest." No facts have been brought out to bring the case of the appellant within one of the recognized exceptions referred to above. The words appear to have been uttered by the defendant with due deliberation in an audible voice and without any regard for the consequences that were to ensue. In *E. Hulton and Co. v. Jones* (1) Lord LOREBURN is reported to have said: A person charged with libel cannot defend himself by showing that he intended in his own breast to defame, or that he intended not to defame the plaintiff, if, in fact, he did both." As we have stated already the true test is, were the words of such a nature and character as in the natural course of things were calculated to harm the plaintiff's reputation? The correct principle has been laid down by Clement Gatlley in his *Law and Practice of Libel and Slander in a Civil Action*, 1924, at page 66: "Any words which have a tendency to hurt or prejudice a man in the exercise of his trade or business are actionable without proof of special damage . . . thus it is actionable to say of a merchant or a tradesman that he has cheated in his trade or that he has nothing but rotten goods in his shop, or that he adulterates his goods or delivers inferior goods to those purchased, or keeps false books of accounts, or uses false scales or weights or takes the goods of his customers and pawns them." We are clearly of opinion that an imputation of dishonesty to the plaintiff who is a tradesman is actionable *per se* and a suit for damages was maintainable without any regard to any question either about the *bona fides* or the intent of the defendant at the time when he used the words.

It follows from what we have stated above that this appeal is devoid of substance and we do hereby dismiss it with costs. The plaintiff has retorted by filing a cross-objection, which he has valued at Rs. 1,586. The trial

(1) (1910) A.C., 20.

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court gave the plaintiff a decree for Rs. 200 only as damages for defamation and allowed him only proportionate costs. What the plaintiff claims is a higher sum than what he was allowed by the court below. He ought to have led some evidence to show what was the extent of damage sustained by him by reason of the slander. The plaintiff has not produced any evidence whatsoever to establish either loss of trade or any other actual loss in any shape or form. Under these circumstances we are not prepared to differ from the trial court in its assessment of damages.

We do not think that the court below has exercised a sound discretion in allowing the plaintiff costs proportionate to the claim allowed by it. The plaintiff's cause of action was well-founded. The defendant was clearly a wrong-doer. We think that in a case where it was extremely difficult for the plaintiff to value his claim at a particular figure, he was justified in assessing his claim at Rs. 5,100. We are of opinion that the plaintiff is entitled to his full costs of the court below, and to this extent we modify the decree of the court below. We allow the plaintiff costs proportionate to his success in his cross-objection, namely Rs. 586-1-6. The defendant appellant will have to bear his own costs throughout.

*Before Sir Grimwood Mears, Knight, Chief Justice, and  
Mr. Justice Mukerji.*

BANKE BIHARI (PLAINTIFF) *v.* BRIJ BIHARI AND  
OTHERS (DEFENDANTS).\*

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December,  
17.

*Hindu law—Partition—Notice by one member demanding  
partition—Revocation—Intention of partition dropped, by  
subsequent agreement of parties—Whether notice per se  
effects partition.*

Where a member of a joint Hindu family sent a registered notice to the other members demanding a partition, but the intention to separate was given up a day or two later as the result of a subsequent agreement of the members at a family meeting and there was no disruption of the family in fact: *Held* that the notice in these circumstances did not, by itself, operate to effect a separation in law. An unequivocal demand for partition, which has not been persisted in and has been withdrawn or abandoned with the consent of the other members of the family, can not be treated as nevertheless effecting a separation. *Ram Kali v. Khamman Lal* (1), *Jai Narain Rai v. Baijnath Rai* (2), *Kedar Nath v. Ratan Singh* (3) and *Palani Ammal v. Muthuvenkatachala Moniagar* (4), referred to.

THE facts of the case are fully stated in the judgment of the Court.

Pandit Uma Shankar Bajpai and Dr. Kailas Nath Katju, for the appellant.

Maulvi Iqbal Ahmad and Maulvi Mukhtar Ahmad, for the respondents.

MEARS, C. J. and MUKERJI, J. :—This appeal arises out of a suit for partition of joint family property, in which the appellant was the plaintiff. The relationship of the parties is shown by the following pedigree.

[The pedigree is omitted, as not being material to this report.]

\*First Appeal No. 131 of 1925, from a decree of Gauri Prasad, Subordinate Judge of Pilibhit, dated the 28th of January, 1925.

(1) (1928) I. L. R., 51 All., 1. (2) (1928) I.L.R., 50 All., 615.  
(3) (1910) I.L.R., 32 All., 415. (4) (1924) I.L.R., 48 Mad., 254.

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The plaintiff's case was that on the death of Bhagwan Das on the 1st of May, 1922, the family estate belonged by right of survivorship to the rest of the family, consisting of the parties to the suit, and that in the case of partition the plaintiff's share was one-half. The plaintiff accordingly claimed separation by metes and bounds of his one-half share.

The defence was that the plaintiff had separated himself from the rest of the family during the lifetime of Bhagwan Das and that he was allotted a quarter share only, to which alone he was entitled.

The learned Subordinate Judge has held that the defendants' case was partially true, that although no partition by metes and bounds took place, as alleged by the defendants, there was nevertheless enough evidence to show that the status of the family had been split up and that the plaintiff had come to be regarded as the owner of a quarter share. The learned Judge accordingly decreed the suit by directing partition of a quarter share to the plaintiff.

The main question for determination in this appeal is whether or not there was an actual disruption of the family by the separation of the plaintiff before the death of Bhagwan Das, or whether at the date of the suit the family still continued to be joint, in which event the plaintiff's share would be one-half.

[A portion of the judgement is here omitted.]

It appears that on the 2nd of February, 1922, the plaintiff sent a registered notice to Bhagwan Das and Ram Bilas demanding partition. The defendants did not rely on it as a document creating, as a matter of law, a separation in the status of the family. The reason was that according to their case the partition had already taken place in July, 1920. The defendants accordingly stated in paragraph 5 of the written statement

that by means of this notice the plaintiff declared the separateness of his status, and the defendants added that it was agreed, as the result of the notice, that a deed of partition would be registered as soon as Bhagwan Das recovered from his illness. It was the defendants' case that on the 2nd of February, 1922, Bhagwan Das was really ill, but we may state at once that there is no reliable evidence to prove this and the court below has not found that such was the case.

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In view of the pleadings stated above the only question for decision was whether the plaintiff had separated in July, 1920. No question arose as to whether, if the family was joint even at the date of the registered notice, namely, the 2nd of February, 1922, the delivery of the notice created a disruption in the family.

The case, however, has been considered from both the aspects and the following issue was framed by the court below:—"Whether the plaintiff separated from the joint family about July, 1920? If the answer to the above be in the negative, is the plaintiff to be looked upon as separated in interest after his notice or registered letter of the 2nd of February, 1922?"

The learned Subordinate Judge held that the plaintiff had severed his interest during the lifetime of Lala Bhagwan Das, but did not say when the disruption took place. As we have already stated, the learned Judge was not satisfied that a partition took place in July, 1920.

Before examining the evidence the learned Judge adopted a method of trying the case of which we do not approve. Instead of arriving at findings of fact first and applying the law then, he proceeded to find out what the law was and then to find his facts. This procedure is calculated to mislead a judge and to tempt him to arrive at findings which are likely to fit in with his view of the



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law. In our opinion this is what has actually happened in this particular case. The learned Judge found as a matter of law that a definite and unambiguous indication by one member of an intention to separate himself and to enjoy his share in severalty may amount to separation. It is not the case that the learned Judge applied this rule of law to the notice dated the 2nd of February, 1922, specifically, but he applied it to the entire case.

The first thing that we have to see is whether the learned Judge erred in his finding of fact, namely, that the plaintiff had separated his status from the joint family and had become a separated member. The learned Judge, as already stated, has discarded the oral evidence adduced on behalf of the defendants. He based his opinion on the account-books said to belong to the family and the account-book of a certain legal practitioner, Lala Tribhuban Lal. He relied also on certain minor pieces of evidence, which will all be noticed in due course.

[The judgement then proceeded to discuss the evidence in detail, and continued.]

The separate and cumulative effect of all these documents undoubtedly is that, at the date of the death of Lala Bhagwan Das, the defendants and Bhagwan Das were living jointly and there was no separation at all.

Now we come to a consideration of the effect of the registered notice which was given, evidently in a fit of petulance, by the plaintiff to Bhagwan Das and Ram Bilas. As we have already said, it is not a part of the defendants' case, as put forward in the written-statement of Ram Bilas, that from the date of the delivery of this notice to the addressees of it, the families became separate, to all intents and purposes. The defendants' case on the other hand was that there already existed a separation which had taken place some 20 months

previously and the result of this notice, dated the 2nd of February, 1922, was only a declaration of the factum of separation. Before we consider the legal effect of this notice, we may at once point out that the very fact that such a notice was given tends to destroy the defendants' case that there had already existed a separation between the parties. By this notice, Bankey Bihari asked for a partition. The reference to "settlement of account" has no reference to any previous partition alleged by the defendants in the written statement, and for two reasons. The notice does not imply any previous partition. Further, the court below has found that there was no partition by metes and bounds and we have found that there was no partition at all.

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There can be no doubt that a member of a joint Hindu family, if he chooses, may separate himself and to effect a separation in status it is not necessary that the other members should be consenting parties. But even where an unequivocal wish to separate is once declared, any separation will not be effected in law if it be found as a fact that the intention was given up as the result of a subsequent agreement of the parties, by which the notice was expressly or impliedly withdrawn. Before we proceed to consider the case-law, let us examine the facts of the case. The plaintiff's case is that after he had given this notice, he was called upon to explain his conduct towards an elder member of the family like Bhagwan Das. One Lal Bahadur, undoubtedly a relation of the parties, and whose brother comes as a witness for the defendants, swears that he was present at the interview. The result of the interview was that the plaintiff was promised some money for his expenses and he admitted his error in asking for partition. There can be no doubt that the plaintiff himself and his witness, Lal Bahadur, have in occasional passages of the evidence



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made statements which cannot be accepted. But it is perfectly clear to us that the notice was not followed by anything serious in the nature of a disruption of the family. The defendants' case is that when the notice was received the plaintiff was told, evidently by Ram Bilas, that Bhagwan Das was ill and the plaintiff must not hurry and when Bhagwan Das got well an account would be taken of what further profits were due to the plaintiff and a deed of partition would be registered. We can take it, therefore, that it is common ground that no actual partition followed the giving of the notice. Again, it is common ground that, as the result of the notice, a meeting among the members of the family took place, in which distant relations may or may not have been present, and nothing came out of the storm which the notice aroused. We may, therefore, safely take it, in view of the subsequent conduct and statements of the parties, enumerated above, and as the evidence adduced by the plaintiff shows, that the plaintiff dropped his idea of separation, at the instance of the other members of the family and possibly of relations like Lal Bahadur. The plaintiff, having no son and only a daughter, his separation meant the loss of a quarter share to the family. Thus every inducement was likely to have been put forward to make the plaintiff abandon his idea of separation. Our finding of fact, therefore, is that the plaintiff did conceive an idea of separation but gave up that idea a day or two later as the result of a family meeting.

Now we come to the question of law which is involved in the second part of the issue framed by the court below and is reproduced here: "Has the plaintiff to be looked upon as separate in interest after his notice or registered letter of the 2nd of February, 1922?"

On behalf of the respondents' reliance has been placed on a statement of law contained in the case of

*Ram Kali v. Khamman Lal* (1) by two learned Judges of this Court, the judgement being delivered by SEN, J. The learned Judges professed to lay down the result of certain decisions of Hindu law relating to joint families and partition. The proposition relied on by the respondents in support of their case is clause (e) at page 28 of the report. To understand this clause (e) we have to read it with the preceding clause (d). They are as follows :—

“(d) It is not necessary that there should be a consensus or agreement among the coparceners for the severance of status of a joint family.

(e) Where severance is effected by explicit declaration, the result is decisive, and the legal result cannot be affected or controlled by subsequent conduct of the parties.”

With the proposition in clause (d) we have no quarrel. As regards clause (e) too, we should have no quarrel with it, if the third word “is” may be read as “has been.”

We have not the least doubt that the learned Judges did use the word “is” in the sense of “has been”. The proposition that is laid down in clause (e) is really a proposition that was laid down by this very Bench of the Court, in *Jai Narain Rai v. Baijnath Rai* (2), quoted by the learned Judges themselves with approval at page 27. This proposition lays down that where there has been completed separation, there can be no joint family afterwards except by way of re-union.

The case before us is whether the evidence before us points to a completed separation or only to an attempted separation. We have found as a fact that there was no completed separation, that a separation was demanded but the demand was given up at the instance of the other members of the family. The question, therefore, is

(1) (1928) I.L.R., 51 All., 1.

(2) (1928) I.L.R., 50 All., 615.

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whether an unequivocal demand which has not been persisted in and has, no doubt, been given up with the consent of the other members of the family, must nevertheless be treated as effecting a separation? The answer to this question is not furnished by the case of *Ram Kali v. Khamman Lal* (1), relied on by the respondents. Indeed their Lordships do concede at page 25 of the report that on the authority of the Privy Council, "it must be held to be settled law that the intention to separate can very well be abandoned." The cases quoted by their Lordships, viz. *Kedar Nath v. Ratan Singh* (2), and *Palani Ammal v. Muthuvenkatachala Moniagar* (3), afford illustrations of a demand for separation subsequently abandoned, with the result that the jointness of the family remained undisturbed. In the case of *Kedar Nath v. Ratan Singh* (2), there were three brothers; one separated outright, the second brought a suit for partition but withdrew his claim and remained joint with the third brother against whom he had brought the suit. Their Lordships held that as between the second and third brothers there was no disruption of jointness. Similarly, in the Madras case there was a demand for separation. A partition suit was filed, but ultimately the matter was compromised. It was held that the family did continue to be joint. In all these cases the demand was abandoned with the consent of the other members of the family. It is not necessary for us to say, definitely, in this case, whether the person making the demand for partition may abandon it without the consent of the other members of the family, so as to enable him to continue to be a member of the joint family. But it is clear to us that, where all the parties are agreed, including the member demanding a separation, that the demand should be withdrawn there is no disruption in the status of the family.

(1) (1928) I.L.R., 51 All., 1.

(2) (1910) I.L.R., 32 All., 415.

(3) (1924) I.L.R., 48 Mad., 254.

Such being our view of the law, we hold that the mere notice of the 2nd of February, 1922, which was never persisted in and which was ultimately given up, did not create a disruption of the joint family.

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The result is that the family was joint when Bhagwan Das died on the 1st of May, 1922. It follows that the plaintiff is entitled to a half share in the entire joint family property.

We allow the appeal, modify the decree of the court below and decree the plaintiff's suit for partition, in its entirety. This will be the preliminary decree in the suit and the partition will be carried out in accordance with law. The plaintiff will have his costs of the suit and of the appeal.

*Before Mr. Justice Sulaiman and Mr. Justice Kendall.*

KUNJ BIHARI AND OTHERS (PLAINTIFFS) v. BINDESHRI PRASAD AND OTHERS (DEFENDANTS).\*

1928  
December,  
20.

*Instalment decree—Instalments not directed to be payable only in court—Date for payment expiring on court holiday—Deposit on re-opening of court—Validity of payment.*

An instalment decree made the first instalment payable on a certain date, but it did not direct that the amount was to be deposited in court. The date specified expired during the vacation of the court, and the amount was tendered in court on the re-opening day. *Held* that as the judgment-debtors had the power to make the payment direct to the decree-holders, and depositing it in court was not the only course open to them, they could not take advantage of the fact that the court was closed on the specified date, and the payment made by them was not made in time. *Muhammad Jan v. Shiam Lal* (1), distinguished.

THE facts of the case sufficiently appear from the judgement of the Court.

Mr. B. Malik, for the appellants.

\*First Appeal No. 398 of 1925, from a decree of Raja Ram, Subordinate Judge of Jaunpur, dated the 20th of May, 1925.  
(1) (1923) I.L.R., 46 All., 328.

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*Babu Piari Lal Banerji and Maulvi Iqbal Ahmad,*  
for the respondents.

SULAIMAN and KENDALL, JJ. :—This is a plaintiffs' appeal arising out of a suit on the basis of two mortgage-deeds for recovery of the principal and interest due on them. Previous to this litigation there was a suit instituted by the plaintiffs which was compromised. Under the compromise decree it was agreed that the amount due on the two bonds would be Rs. 18,750-2-0 and that simple interest on that sum would be paid at the rate of eight annas per cent. per mensem from the date of the execution of the "document" up to the date of realization. Five instalments were fixed, the first one was of Rs. 3,750-0-4, payable with interest on the 15th of June, 1924. There was an express provision that in default of payment of any instalment it was to be paid in a lump sum. There were further provisions in the decree which showed that the effect of the regular payment would be to prevent the mortgagees from bringing any suit to recover the amount due on the decree. The plaintiffs claimed that inasmuch as the defendants did not pay the first instalment on the 15th of June, 1924, they were entitled to recover the full amount borrowed on the two documents. The principal defence was that on the 15th of June, 1924, the civil court was closed, and that a tender was actually filed on the 3rd of July, 1924, when the court re-opened. The tender was signed by the judicial officer on the 4th of July, 1924, and the cash was actually deposited in the Government Treasury on the 5th of July. The plea has found favour with the court below, which has held that inasmuch as the civil court was closed on the 15th of June the defendants were entitled to make the tender on the re-opening date and that accordingly there was no default. For this view the learned Judge has relied on the recent Full Bench case of

*Muhammad Jan v Shiam Lal* (1). The learned advocate for the respondents has strongly urged before us that under the terms of the decree the amount had to be deposited in court in the execution department. In the next place it is argued that, even if that was not so, under order XXI, rule 1, his clients had the option of either paying the amount direct to the decree-holders or depositing it in court, and inasmuch as they had the right to deposit it in court they could wait till the civil court re-opened.

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In our opinion the payment of the instalments and the right of the decree-holders to recover the amount due was not intended to be exercised through the execution court. There is an express mention in the decree of the mortgagees' power to bring a suit and recover the amount. In that view it may be difficult to apply order XXI, rule 1.

But assuming that the defendants had the power to make the payment direct to the mortgagees or to deposit the amount in court, they cannot take advantage of the circumstance that the civil court was closed on the 15th of June, 1924. If the only course open to them had been to deposit it in court and the court was closed on the last date on which they could have made the deposit, then the ruling in the Full Bench case would have been applicable. That was a case of a deposit under a pre-emption decree, and in view of the provisions of order XX, rule 14, that deposit had to be made in court. The judgement-debtors in that case had no option but to deposit the amount in court, and accordingly it was held by the Full Bench that if the court by its own act prevented the judgement-debtors from making the deposit within the time they should not be deprived of their right to do so, provided they came into court at the first opportunity available, namely the re-opening day of the court.

(1) (1923) I.L.R., 46 All., 328.



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In the present case the defendants on their own showing had the option of making the payment to the mortgagees direct. From this they were in no way prevented on account of the court being closed. They were not compelled to wait till the court re-opened. They had an opportunity available to them of which they did not take advantage. We do not, therefore, think that they were entitled to say that the time fixed in the compromise decree for the payment of the first instalment should be extended. Accordingly there was a default on the 15th of June, 1924, which entitled the plaintiffs to claim the whole amount. As matters stand now, all the dates fixed for the payment of all the instalments have expired and the whole amount has undoubtedly become due under the terms of the compromise decree. We accordingly allow the appeal with costs and, setting aside the decree of the court below, decree the plaintiffs' claim for the whole amount of Rs. 18,750-0-0 due on the two bonds as principal, together with interest at eight anras per cent. per mensem from the dates of the execution of the hypothecation bonds. The usual decree under order XXXIV will be prepared and six months' time from this date should be fixed for payment.

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January, 3.

Before Mr. Justice Sulaiman and Mr. Justice Kendall.  
KUNDAN LAL AND ANOTHER (DEFENDANTS) v. BHIKARI  
DAS ISHWAR DAS AND ANOTHER (PLAINTIFFS)\*.

*Cause of action—Hundi—Inadmissible in evidence for non-cancellation of stamp—Original consideration—Money had and received—Evidence aliunde—Act No. I of 1872 (Evidence Act), section 91—Notice of dishonour, when unnecessary—Act No. XXVI of 1881 (Negotiable Instruments Act), section 98(e)—Act No. IX of 1872 (Contract Act), section 70.*

If a *hundi* is the embodiment of the whole contract between the parties, and the *hundi* is not admissible in evidence

\*First Appeal No. 443 of 1925, from a decree of Syed Ali Mohammad, Subordinate Judge of Meerut, dated the 27th of July, 1925.

and can not be looked at for the purpose of finding out the terms of the contract, then, under section 91 of the Indian Evidence Act, the plaintiff suing on the *hundi* cannot be allowed to adduce other evidence to prove the terms of such contract. But from the mere fact that a bill of exchange or *hundi* has been executed it does not necessarily follow that the whole of the contract between the parties has been reduced to the form of such a document. In many cases a promissory note or *hundi* may merely be a written security taken for the loan.

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Where in a suit on a *hundi*, which was inadmissible in evidence, being written on stamps which were not properly cancelled, it appeared that besides the *hundi* the defendants executed a receipt which referred to it and contained an acknowledgment of receipt of the amount, and also wrote a letter to a certain firm showing that the arrangement between the parties was that the plaintiffs were to discharge the defendants' liability to the firm and the defendants promised to pay this amount to the plaintiffs and in token thereof the *hundi* was executed: *Held* that this was not a case in which the whole of the contract was embodied in the *hundi*, and the receipt and the letter were admissible for the purpose of showing the whole arrangement between the parties, the passing of consideration and the promise to repay. Even if the plaintiffs were not able to prove the whole contract by this additional evidence, they could succeed if their suit were treated as one for the recovery of money had and received, or for compensation for the amount paid by them on behalf of the defendants to the creditor of the latter, under section 70 of the Contract Act.

According to section 98(e) of the Negotiable Instruments Act, where the acceptor of a bill of exchange is one of the drawers thereof, all the drawers are liable thereon even without any notice of dishonour being given.

*Sheikh Akbar v. Sheikh Khan* (1), *Banarsi Prasad v. Fazal Ahmad* (2), *Sri Nath Das v. Angad Singh* (3), *Ram Sarup v. Jasodha Kunwar* (4), *Baij Nath Das v. Salig Ram* (5), *Muthu Sastrigal v. Visvanatha* (6), *Gurdas Mal v. Ishar*

(1) (1881) I.L.R., 7 Cal., 256.

(2) (1905) I.L.R., 28 All., 298.

(3) (1910) 7 A.L.J., 459.

(4) (1911) I.L.R., 34 All., 158.

(5) (1912) 16 Indian Cases, 38.

(6) (1913) I.L.R., 38 Mad., 660.



1929 *Das (1) and Pramatha Nath Sandal v. Dwarka Nath Dey (2),*  
KUNDAN LAL referred to.

*v.*  
BHIKARI DAS THE facts of the case fully appear from the judge-  
ISHWAR DAS. ment of the Court.

Dr. Kailas Nath Katju, for the appellants.

Dr. N. C. Vaish, for the respondents.

SULAIMAN and KENDALL, JJ.:—This is a defendants' appeal arising out of a suit for recovery of Rs. 9,000 and odd on the basis of two *hundis* for Rs. 5,000 and Rs. 4,500 respectively, executed by the defendants Kundan Lal and Suraj Bhan in favour of the plaintiffs. The case as put forward in the plaint was that the defendants were partners of a firm styled Kundan Lal and Suraj Bhan, carrying on business at Hapur, and they executed these *hundis* on the 15th of December, 1922, on receipt of consideration and made them over to the plaintiffs; that these *hundis* were accepted by Kundan Lal, defendant No. 1, who was a proprietor of a firm styled Banwari Lal Kundan Lal, on which these *hundis* were drawn; that the *hundis* were presented for payment and they were dishonoured. The defendants pleaded that the *hundis* were not properly cancelled and that the interest of 15 annas per cent. per mensem claimed in the plaint was excessive. They also denied the receipt of consideration, and pleaded that these *hundis* were executed merely as security for loss that might be incurred in certain gambling transactions. Suraj Bhan, defendant No. 2, further pleaded that no notice of dishonour had been given to him and he was not liable under the *hundis*. The court below has held that the *hundis* were not properly cancelled and are not admissible in evidence. But it has allowed the plaintiffs to fall back on the original consideration and has decreed the claim against both the defendants, holding that there

(1) (1920) 60 Indian Cases, 107.

(2) (1896) 1 L.R., 23 Cal., 851.

was no defect of want of notice of dishonour so far as Suraj Bhan was concerned.

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These *hundis* were not on single stamp papers. Three stamps were used for one *hundi* and two for the other. There was no actual deficiency in the value of the stamps employed but these impressed stamps were pasted one upon the other, leaving writing space only on the last stamp on which alone the *hundis* were written. The other stamps were merely pasted on to them and they were not in any way cancelled, nothing having been actually written on them. The court below has held that in view of the provisions of section 13 of the Stamp Act, which requires that every instrument written upon paper stamped with an impressed stamp shall be written in such manner that the stamp may appear on the face of the instrument and cannot be used or applied to any other instrument, the stamps were not properly cancelled. The finding of the court below on this point has not been challenged before us. It must therefore be taken that the stamps used for the *hundis* were not properly cancelled and that these *hundis* therefore are not admissible in evidence.

It would be convenient to dispose of the plea of want of notice of dishonour to Suraj Bhan at the outset. In the first place, as the *hundis* are not admissible in evidence, the claim on the basis of these *hundis* cannot be decreed, and therefore no plea as to want of a notice of dishonour really arises in the case. Furthermore, section 98, sub-clause (e), of the Negotiable Instruments Act makes it quite clear that no notice of dishonour is necessary to charge the drawers when the acceptor is also a drawer. The use of the singular "drawer" following the plural "drawers" in the section shows that if the acceptor is one of the drawers both the drawers would be liable even though no notice of dishonour has been

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given. Kundan Lal, who was one of the drawers, was the acceptor, and therefore a notice of dishonour was not necessary even as regards Suraj Bhan.

The main question which has been argued before us is whether, when the *hundis* are inadmissible in evidence, the plaintiffs can fall back on the consideration alleged to have been paid by them. It is well settled that if a promissory note or a bill of exchange is executed in lieu of previously existing debts, and the document becomes inadmissible in evidence, the promisee can fall back on the original consideration and prove it. The learned advocate for the appellants, however, contends that when the consideration has passed on the bills of exchange themselves then the latter embody the contract between the parties and no other evidence can be given to prove such contract in view of the provisions of section 91 of the Indian Evidence Act.

The leading case on this point is *Sheikh Akbar v. Sheikh Khan* (1), which has been followed, distinguished and discussed in numerous subsequent cases. GARTH, C. J., did remark in that case that when a cause of action for money is once complete in itself and the debtor then gives a bill or note to the creditor for payment of the money the creditor may sue for the original consideration and may disregard the bill or note; but when the original cause of action is a bill or note itself and does not exist independently of it there is no cause of action for money lent otherwise than upon the note itself. That case was one where in consideration of A depositing money with B, the latter contracted by a promissory note to repay the amount with interest at a future date.

So far as this Court is concerned there are numerous cases which have laid down that even on failure of the

(1) (1881) I.L.R., 7 Cal., 256.

bills of exchange the creditor can fall back on the original consideration. In *Banarsi Prasad v. Fazal Ahmad* (1) <sup>1929</sup> KUNDAN LAL the case of *Sheikh Akbar* was followed and it was held <sup>v.</sup> BHIKARI DAS. that when a cause of action for money was once complete in itself and the debtor then gave a bill or note to the creditor, the latter could then sue for the original consideration even if the note was not cancelled. The learned Judges remarked that the plaintiff in that suit had stated the consideration of the note, viz. money borrowed by the defendant, and alleged that the security was given to him for the loan by the making of the note in question. They accordingly held that it was open to the plaintiff to give evidence *aliunde* to prove the consideration even though the note was not admissible in evidence. Similarly in *Sri Nath Das v. Angad Singh* (2) it was held that a creditor who has got a security for an advance of the money made by him may as a rule sue for the original consideration, provided that he has not endorsed or lost or parted with the bill of exchange or promissory note, which he may have under such circumstances as would render the debtor liable upon it to some third person. In that case both the father and the son had borrowed money from the plaintiff and the son alone, who was a minor, had given the promissory note for the amount. <sup>ISHWAR DAS.</sup>

In *Ram Sarup v. Jasodha Kunwar* (3) the previous authorities were considered and the case of *Sheikh Akbar* distinguished. The conclusion at which the Bench arrived was that where the plaintiff is able to prove the loan independently and without the assistance of a promissory note, which not having been properly cancelled is inadmissible in evidence, he can succeed. The argument, that where the lending of money and taking of note was a simultaneous transaction and the

(1) (1905) I.L.R., 28 All., 298.

(2) (1910) 7 A.L.J., 459.

(3) (1911) I.L.R., 34 All., 158.

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parties all along contemplated that the loan should be secured by the giving and the receiving of note, the plaintiff must stand or fall by the claim based upon the promissory note and that if he is unable to give the note in evidence the whole suit fails, was not accepted. These cases proceed principally on the principles of equity, and do not expressly consider the provisions of section 91 of the Indian Evidence Act. In a later case, viz. *Baij Nath Das v. Salig Ram* (1) the previous authorities were re-considered at considerable length and the applicability of section 91 was not overlooked. The learned Judges came to the conclusion that none of the previous cases laid down that where a promissory note, which is inadmissible in evidence, is taken in consideration of the money advanced, the plaintiff cannot sue for money had and received by the defendant for the plaintiff's use, and held that such a suit may be treated as a suit for money had and received, if the pleadings are properly framed without treating it as such a suit. On the other hand it cannot be doubted that the opinion of other High Courts has been somewhat different. We may only refer to *Muthu Sastrigal v. Visvanatha* (2) and *Gurdas Mal v. Ishar Das* (3) where greater stress has been laid on the provisions of section 91. We may also note that the case of *Sheikh Akbar* was distinguished by the Calcutta High Court itself in *Pramatha Nath Sandal v. Dwarka Nath Dey* (4).

It is true that in considering this point we cannot be solely guided by the equitable considerations which are given effect to in English cases. The express provisions of section 91 of the Indian Evidence Act cannot be ignored. Under that section, where the terms of a contract have been reduced to the form of a document, no evidence can be given in proof of the terms of

(1) (1912) 16 Indian Cases, 39.

(2) (1913) I.L.R., 38 Mad., 660.

(3) (1920) 60 Indian Cases, 107.

(4) (1896) I.L.R., 23 Cal., 851.

such contract except the document itself or secondary evidence of its contents where it is admissible. If therefore the *hundis* are the embodiment of the whole contract between the parties and those *hundis* are not admissible in evidence and cannot be looked at for the purpose of finding out the terms of the contract, the plaintiffs cannot be allowed to adduce other evidence to prove the terms of such contract. It is conceivable that in special cases a bill of exchange or a promissory note may be the only document containing the terms of the contract between the parties, and in such a case if that document cannot be adduced in evidence the creditor may be prevented from recovering the amount. This is clear from illustration (c) to section 91. On the other hand, from the mere fact that a bill of exchange or *hundi* has been executed it does not necessarily follow that the whole of the contract between the parties has been reduced to the form of such a document. A *hundi* is principally a written promise to pay a fixed amount on or after a certain date. It does not necessarily contain all the terms of the agreement between the parties as a bond, for instance, would do. In many cases a promissory note or a *hundi* may merely be a written security taken for the loan. The promise to pay the amount may be only a part of the whole contract between the parties, in which case it cannot be said that that contract has been reduced to the form of a *hundi*. In such cases it would be impossible to hold that the provisions of section 91 would exclude evidence showing the terms of the whole contract which cannot be determined from the *hundi* alone.

In the present case we find that on the 15th of December, 1922, four documents were executed. Besides the two *hundis* referred to above the defendants executed a receipt, which referred to the two *hundis*,

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stating the amount of Rs. 9,500 for which they were drawn and the period of their maturity. It further contained an acknowledgment of the receipt of consideration, viz. Rs. 9,500, on account of the *hundis*. They also wrote a letter addressed to the Bombay firm, Bhikari Das Hazari Lal, stating that they had paid to this firm in full whatever was found due to it by them, and acknowledging receipt of interest and profit. The receipt and the letter *per se* cannot be said to be inadmissible in evidence. They show that the arrangement between the parties was that the plaintiffs were to discharge the defendants' liability to the Bombay firm and the defendants promised to pay this amount to the plaintiffs and in token thereof the *hundis* were executed. The whole of this arrangement cannot certainly be found in *hundis*, which cannot contain the terms of such an agreement. There is no doubt that the plaintiffs can independently of the *hundis* prove the passing of consideration, and they can also independently of them prove that the consideration was paid in pursuance of a contract between the parties which could not have been entered in the *hundis*. We therefore think that the receipt and the letter are admissible for the purpose of showing the whole arrangement between the parties, and do *prima facie* show that the receipt of consideration of Rs. 9,500 was admitted by the defendants, and there was a promise to repay the amount in consideration of the plaintiffs paying the same to the Bombay firm to which the defendants were indebted.

That the *hundis* were not the documents embodying the whole of the contract between the parties but were executed in token of the advance made by the plaintiffs is partially admitted by both the defendants, inasmuch as in their written statement they pleaded that the *hundis* were executed by way of security for the

prospective losses in certain transactions. Suraj Bhan, one of the defendants, who was examined as a witness in this case, also stated that he was approached by Dal Chand of Bombay to clear off the Bombay account and that the *hundis* were written partly for the losses of the Bombay transaction and partly as security for the future transactions to be made by Kundan Lal.

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We further think that even if the plaintiffs were not able to prove the whole contract by this additional evidence, they could succeed if their suit were treated as one for recovery of the amount had and received, or for compensation for the amount paid by them on behalf of the defendants to the creditor of the latter under section 70 of the Indian Contract Act. The suit therefore cannot necessarily fail because the *hundis* are not admissible in evidence.

It is, however, obvious that the plaintiffs are not entitled to fall back on the original indebtedness of the defendants to the Bombay firm. No doubt the nature of the Bombay transactions, that is to say whether they were of a wagering character or not, is wholly immaterial if the plaintiffs have discharged the defendants' liability. Admittedly the firms at Hapur and Bombay are different, and the plaintiffs as representing the Hapur firm are not entitled to recover the amount due to the Bombay firm. Nor can they be allowed to do so when many more defences might have been open to the defendants if the Bombay firm had sued. But if the plaintiffs can establish that they have paid off the Bombay firm and thereby discharged the defendants' liability at their request, they will be entitled to recover the amount with interest to the extent that they have been out of pocket. But it is incumbent on them to establish that they have discharged such liability of the defendants.



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[A portion of the judgement, not material to this report, is here omitted.]

We think that it is absolutely necessary to ascertain definitely whether the plaintiffs have actually discharged the defendants' liability to the Bombay firm or not. The plaint did not contain any express allegation as regards this matter, because it was principally based on the two *hundis*. We accordingly think that before we finally dispose of the appeal it is necessary to have additional evidence and a fresh finding on the question of the extent to which the plaintiffs have discharged the defendants' liability to the Bombay firm in pursuance of the agreement which was entered into between the parties on the 15th of December, 1922. We accordingly send down the above issue to the court below for a finding and report.

### REVISIONAL CRIMINAL.

*Before Mr. Justice Boys.*

EMPEROR v. MEWA LAL AND OTHERS.\*

1929  
January,  
3.

*Criminal Procedure Code, section 106—Security for keeping the peace—Conviction under section 323, Indian Penal Code—Offence involving a breach of the peace—Likelihood of recurrence—Graver offence proved than that charged—Duty of court—Summary trial.*

It is not right for a court to minimise an offence and shut its eyes to a graver offence which on the facts found by it has been committed, and to refrain from charging the accused with that offence, and by such abstention to justify itself in trying the case summarily.

In all ordinary cases of conviction under section 323 of the Indian Penal Code there is a conviction for an offence involving a breach of the peace, and the necessity and desirability of taking security under section 106 of the Code of

\*Criminal Reference no. 823 of 1928.

Criminal Procedure must be judged in each case and must depend upon how far the circumstances indicate that such a breach of the peace is likely to recur.

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*Emperor v. Atma Ram* (1) and *Muhammad Rahim v. Emperor* (2), explained. *Sobha Ram v. Emperor* (3), followed.

The applicants were not represented.

The Assistant Government Advocate (Dr. M. Waliullah), for the Crown.

Boys, J. :—This is a reference by the learned Additional Sessions Judge of Pilibhit. Five persons were convicted under section 323 of the Indian Penal Code and four of them were sentenced to pay fines. A boy of the name of Debidin was ordered to be released and made over to a relative on the execution of a bond for his good behaviour. Further, the four adult accused were ordered to furnish security under section 106 of the Code of Criminal Procedure for a period of one year. The four adult accused applied in revision to the Sessions Judge of Pilibhit,—an application which resulted in this reference. The effective ground taken in revision was that it having been found that five persons took part in the assault there was a riot, and the Magistrate had no jurisdiction to try the case summarily. It has been repeatedly held that it is not right to minimize an offence, for the court to shut its eyes to a graver offence which on the facts found by it has been committed, and to refrain from charging the accused with that offence, and by such abstention to justify itself in trying the case summarily. The learned Sessions Judge has referred the case on this amongst other grounds. He has also expressed an opinion that a sentence of imprisonment was called for if the accused were, as they were found to be, guilty. The Magistrate found : “The high-handed manner in which the accused have tried to take the law

(1) (1926) I.L.R., 49 All., 131. (2) (1925) 23 A.L.J., 1053.

(3) Cr. Ref. No. 18 of 1928, decided on 2nd May, 1928.

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MEWA<sup>v.</sup> LAL into their own hands does not require that a lenient view should be taken. Still I would not send the accused to jail." At the re-trial which I am going to order, the Magistrate will no doubt not allow himself to be prejudiced by the fact that the accused have already been found guilty by another court. He will similarly exercise his own judgment as to the appropriate punishment, should he arrive at a finding of guilty.

Before concluding it is necessary to mention another point on which the learned Judge has referred the case, since I am not in agreement with him. The trial Magistrate, convicting the five persons under section 323 of the Indian Penal Code, held: "Five men caused serious injuries in a high-handed manner to an old man and their action involved a breach of the peace; there are, as I have already said, old sores that have not healed up; there is the section 498 affair still fresh and the accused have shown a spirit of intolerance. I am of opinion that it is necessary to bind the accused to keep the peace." He proceeded to bind the accused over under section 106 of the Code of Criminal Procedure to keep the peace for one year.

The learned Sessions Judge appears to have been of opinion that that order under section 106 was illegal. He refers to a decision of a Judge of this Court in *Emperor v. Atma Ram* (1). That case followed a decision of the same Judge in *Muhammad Rahim v. Emperor* (2). The learned Judge in *Muhammad Rahim v. Emperor* said:—"Upon the mere finding that the accused and the complainant were not on good terms it is impossible to maintain the order passed, which does not come within the purview of section 106 of the Code of Criminal Procedure," and in the case of *Emperor v. Atma Ram* the

(1) (1926) I.L.R., 49 All., 131.

(2) (1925) 23 A. L. J., 1053.

learned Judge remarked : “ Now section 323 of the Indian Penal Code is not an offence referred to in section 106 of the Code of Criminal Procedure, but even then an order can be passed after a conviction under this section if it was found by the Magistrate that the offence involved a breach of the peace. But there must be a finding of the Magistrate; otherwise his order is not justified.” These remarks have been understood by the learned Sessions Judge to lay down a rule that security cannot be demanded under section 106 of the Code of Criminal Procedure, where there has been a conviction under section 323, merely on the ground that there is ill-feeling between the parties and that there are old sores not healed up. I am inclined myself to think that the learned Judge’s decisions in the cases referred to were on their particular facts. For instance he describes the case *Emperor v. Atma Ram* (1) in the following words :—“ This was a case under section 323 of the Indian Penal Code and it arose simply on account of a sudden altercation over a trivial matter.” If this is all that there was to show that the parties bore ill-feeling towards each other, it may well be that in the opinion of the learned Judge there was no sufficient indication that in the terms of section 106 it was “ necessary to require such person to execute a bond for keeping the peace.” But the necessity must be judged in each case. I do not think that either of the two cases throws any doubt on the proposition of law that in all ordinary cases of conviction under section 323 there is a conviction for an offence involving a breach of the peace, and the desirability of taking security must depend upon how far the circumstances indicate that such a breach of the peace is likely to recur. This is the view upon which Mr. Justice KING and I myself acted without hesitation in the case *Sobha Ram v. Emperor* (2). It will, therefore, be open to the

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(1) (1926) I.L.R., 49 All., 181.

(2) Cr. Ref. No. 18 of 1928, decided on 2nd May, 1928.

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Magistrate at the re-trial to take a bond under section 106 if in his opinion the facts proved indicate the likelihood of a breach of the peace in the future on the part of the accused, of course provided that he has arrived at a conviction within section 106.

Accepting the reference I set aside the convictions and sentences and direct that the fines, if paid, be returned, and that the five accused persons be re-tried in the court of a competent Magistrate in a regular trial, not summarily, upon charges under sections 323 and 147 of the Indian Penal Code, and any other charges that may be disclosed by the evidence.

#### APPELLATE CRIMINAL.

*Before Mr. Justice Dalal.*

1929  
January, 4.

EMPEROR *v.* JANESHAR DAS AND ANOTHER.\*

*Criminal Procedure Code, sections 233, 234, 236, 239—Joinder of charges against several accused—Abetment as alternative charge counts as a distinct charge—Joint trial of two accused for three offences of the same kind, each accused being also charged in the alternative with having abetted the other—Prejudice.*

Two servants of a Government treasury were charged with three offences of criminal breach of trust, committed within the space of twelve months; each accused was also charged, in the alternative, with abetment of breach of trust committed by the other, in respect of each of the three items. They were tried jointly in one trial on all the charges. *Held* that when a man was charged in the alternative with embezzlement or abetment thereof he had to meet two distinct sets of circumstances, and each of the accused therefore was really tried for six offences. This was against the spirit of the provisions of section 233 of the Code of Criminal Procedure and was not covered by any of the exceptions detailed in the sections following it. The trial was illegal; and the question whether the accused were prejudiced or not did not arise.

\* Criminal Appeal No. 749 of 1928, from an order of Pratap Singh, Additional Sessions Judge of Meerut, dated the 3rd of September, 1928.

The provisions of section 236 could not be utilized to declare the charge in the alternative of embezzlement and abetment thereof to be one charge; it involved two separate charges.

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Scope of section 239 discussed. *Ram Prasad v. King-Emperor* (1) and *Emperor v. Sheo Saran Lal* (2), referred to. *In re Bal Gangadhar Tilak* (3), distinguished.

THE facts of the case are fully set forth in the judgment of the Court.

Babu *Piari Lal Banerji*, Maulvi *Iqbal Ahmad* and Babu *Saila Nath Mukerji*, for the appellants.

The Government Pleader (Mr. *Sankar Saran*), for the Crown.

DALAL, J. :—Janeshar Das and Khushi Ram, two servants of the treasurer of the Muzaffarnagar treasury, were charged with three offences and each offence was framed in the alternative, either of criminal breach of trust or abetment thereof. There was found a deficiency on a certain date in stamp labels kept in the double-lock of the treasury and in the cash kept in the single-lock. Inquiry was made and the prosecuting agency appears to have been doubtful whether Janeshar Das committed the breach of trust and Khushi Ram abetted him, or whether Khushi Ram committed the breach of trust and Janeshar Das abetted him. Three items of defalcation were chosen, two relating to stamps and one relating to cash, and as regards each item the charge was framed in the alternative. Both Janeshar Das and Khushi Ram were tried jointly. In this Court the argument of Janeshar Das has been that he was born a fool and the blackguard of the piece was Khushi Ram. On his behalf no allegation was made as to the illegality of the trial. This point, however, was stressed with great force by Mr. *Banerji* on behalf of Khushi Ram, as the learned counsel

(1) (1921) 19 A. L. J., 796.

(2) (1910) I. L. R., 32 All., 219.

(3) (1908) I. L. R., 33 Bom., 221.



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appears to have felt that the cause of Khushi Ram was damaged by joint prosecution with Janeshar Das.

The provisions of section 239 of the Code of Criminal Procedure lay down how persons will be charged and tried together. Mr. *Banerji* argued that Khushi Ram was really charged for more than three offences, in fact six, as in each case he was charged in the alternative for breach of trust and for abetment thereof. This Court has held that the provisions of section 239 of the Code are to be considered exclusively, without the help of the provisions of sections 234 to 238. In 1921 in the case of *Ram Prasad v. King-Emperor* (1), KANHAIYA LAL and WALLACH, JJ., had before them the trial of more than one person for three offences of dacoity. They observed :—

“The four accused could also have been tried jointly in *one* trial for any one of the three dacoities in which they are alleged to have taken part, but all could not be tried together at one trial for the three dacoities, as these offences were not committed in the same transaction. Section 234 is one of a number of sections which are grouped together under the heading of ‘joinder of charges.’ This may, and in fact does, refer to charges both against a single and several accused. But the sections under the general heading relating to these respective cases are kept separate. Section 233 lays down a general rule that for every distinct offence there is to be a separate charge and that every such charge is to be tried separately, except in the cases mentioned in sections 234, 235, 236 and 239. Sections 234 to 238 by their terms refer to the case of a single accused. Section 239 deals with the case where more persons than one are accused. The legislature intended to and did by these sections differentiate between the cases of a single and several accused. It cannot be said that all the sections prior to section 239 apply to both these cases although in terms they refer to one only, viz., that of a single accused. The existence of a section (239) specifically dealing with the case of *several* accused, and the arrangement of the sections to which we have referred, constitutes such a repugnancy in the context as prevents us from reading ‘a person’ in section 234 as including several persons.”

(1) (1921) 19 A. L. J., 796 (797).

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These observations were made prior to 1923. The provisions of section 239 at that time were as follows :— “When more persons than one are accused of the same offence or of different offences committed in the same transaction, or when one person is accused of committing any offence and another of abetment of, or attempt to commit, such offence, they may be charged and tried together or separately, as the court thinks fit and the provisions contained in the former part of this Chapter shall apply to all such charges.” The section was entirely recast by Act XVIII of 1923, and at present a joint trial is permitted of persons accused of more than one offence of the same kind, within the meaning of section 234, committed by them jointly within the period of twelve months. Obviously, therefore, when more persons than one are tried jointly reference cannot be made to provisions of the Code previous to section 239 indiscriminately. If that had been the intention it would not have been necessary to state definitely that persons accused of more than one offence of the same kind, within the meaning of section 234, committed by them jointly within the period of twelve months may be tried together. It is important to remember this, because the learned Government Pleader referred the Court to the words at the end of the section “and the provisions contained in the former part of this Chapter shall, so far as may be, apply to all such charges.” Those words existed when the Bench ruling in the case of *Ram Prasad* was pronounced and the learned Judges refused to read the provisions of section 234 conjointly with the provisions of section 239. In my opinion the words at the end of the section are more by way of limitation than extension. The serious question that arises is whether the appellants should be considered to have been prosecuted on six charges; or on three alternative



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charges, each alternative case forming one charge. Mr. *Banerji*, in my opinion, rightly pointed out in this connection that if the legislature considered an offence and an abetment thereof in the alternative to be one charge there was no necessity to preserve clause (b) of section 239 when that section was recast in 1923. That clause permits the joint trial of persons accused of an offence and persons accused of abetment, or of an attempt to commit such offence. If an offence and the abetment thereof were considered to be the same offence the case would have been covered by clause (a) without any specification in clause (b). The argument on behalf of the Crown was that the provisions of section 236 should be read along with the provisions of section 239. Under section 236 if a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once. At present I am not called upon to give an opinion whether this provision and the provisions of section 234 as to trial of accused persons for three offences committed within the space of twelve months are exclusive or not. The question is whether the provisions of section 236 may be utilized to declare the charge in the alternative of embezzlement and abetment thereof to be one charge. The provisions of section 236 themselves do not designate these separate charges as one charge, but designate them as different charges in the alternative, and that is why special permission is given under the Act for the trial of such charges. The Bombay High Court, in *In re Bal Gangadhar Tilak* (1), was of opinion that sections 234, 235, 236, and 239 were not mutually exclusive. It may be respectfully submitted that there was only one person up for trial in that

(1) (1908) I. L. R., 33 Bom., 221.

case, and the consideration of the provisions of section 239 did not arise in that case. We have also seen how a Bench of equal authority of this Court held several years later that the provisions of section 239 were exclusive. A single Judge of this Court in 1910, in *Emperor v. Sheo Saran Lal* (1), was not prepared to follow the reasoning of the Bombay High Court in the case of *Bal Gangadhar Tilak*. In that case an attempt was made to combine the provisions of section 234 and of section 235(1). It was argued there that if an accused person goes through three similar transactions within the period of twelve months, committing in each transaction the same series of offences, he can be tried at one and the same trial on account of all offences committed in the course of the three transactions, even if they total more than three. The learned Judge refused to extend the exception mentioned in section 234 by adding to it the exception mentioned in section 235(1). So far as this Court is concerned, the opinion has been that the provisions of sections 234, 235 and 236 are mutually exclusive. There is all the more reason, therefore, to hold that the provisions of section 239 stand by themselves and the scope thereof cannot be extended by use of the provisions of sections not referred to in section 239. In my opinion there is considerable reason in this view. When a man is charged in the alternative with embezzlement or abetment thereof he has to meet two distinct sets of circumstances. When in three separate cases he is charged in the alternative he has to meet six distinct sets of circumstances. This would be against the spirit of the provisions of section 233 and would not be covered by any of the exceptions detailed in the sections that follow section 233. In my opinion Khushi Ram was really tried for six offences. The trial was illegal, and the question whether Khushi

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Ram was prejudiced or not does not arise. At the same time it is possible that he was prejudiced in so far that Janeshar Das has attempted to throw the entire blame on him. Prejudice must also be presumed from the confusion arising from a man being called upon to face at a single trial six sets of circumstances.

In the result I set aside the convictions and sentences and order a re-trial of Janeshar Das and Khushi Ram. It will be for the prosecution to decide whether they should be tried jointly or separately. Possibly a separate trial would be more advisable, and the point should also be kept in view that so far as this Court is concerned the provisions of sections 234, 235, and 236 are considered to be mutually exclusive.

A request was made on behalf of Khushi Ram that the same learned Judge who convicted him may not hold the fresh trial. This is a reasonable request. The Sessions Judge of Meerut is requested to see that the trial is held by some other Sessions Judge.

#### FULL BENCH.

*Before Mr. Justice Dalal, Mr. Justice Sen and Mr. Justice King.*

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 January, 7. ANWAR KHAN (PETITIONER) v. MUHAMMAD KHAN  
 AND OTHERS (OPPOSITE PARTIES).\*

*Act No. V of 1920 (Provincial Insolvency Act), sections 4, 53—Act No. IV of 1882 (Transfer of Property Act), section 53—Jurisdiction—Insolvency court—Fraudulent transfer made more than two years before order of adjudication—Receiver questioning such transfer—Forum of trial.*

A receiver in insolvency having attached a house as the property of the insolvent, a stranger to the insolvency proceed-

\* Second Appeal No. 4 of 1928, from an order of E. Bennet, District Judge of Agra, dated the 29th of October, 1927.

ings intervened and claimed to have purchased the house from the insolvent, four years prior to the order of adjudication. The receiver pleaded that the sale deed was fictitious, fraudulent and without consideration. The question arose whether the matter could be tried and decided by the insolvency court, or whether the receiver must seek his remedy by a regular civil suit brought on the basis of section 53 of the Transfer of Property Act.

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*Held* (per DALAL and KING, JJ.; SEN, J., dissenting), on an interpretation of sections 4 and 53 of the Provincial Insolvency Act, 1920, that an insolvency court can try a question of title raised on the basis of a transfer which took place more than two years prior to the adjudication of the transferor as an insolvent.

Section 53 of the Provincial Insolvency Act, 1920, does not deal with the jurisdiction of the insolvency court, but only lays down certain rules of law affecting those transactions which fall within its scope; it does not control or restrict the jurisdiction conferred upon the court by section 4 to decide all questions of title.

*Per* SEN, J. :—An insolvency court can not try a question of title relating to a transfer which has taken place more than two years before the order of adjudication.

Where the transfer was intended not to be operative from the beginning and the insolvent had remained in possession of the property, the receiver may apply for its annulment. But where the transfer was executed by a proper instrument, was duly registered, and was intended to put the property beyond the reach of the creditors, and a third party is claiming under the transfer, such a transaction can not be treated as a mere paper transaction. In the latter case, section 53 of the Insolvency Act will apply.

The powers of the insolvency court to adjudicate upon claims as regards third parties are limited and controlled by sections like 53 and 54, and the opening words of section 4—"subject to the provisions of this Act"—have been deliberately introduced to indicate and define the extent of the jurisdiction which was intended to be conferred upon the court of insolvency.

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*Shikri Prasad v. Aziz Ali* (1), *Maharana Kunwar v. E. V. David* (2), *Kaniz Fatima v. Narain Singh* (3), *Hari Chand Rai v. Moti Ram* (4), *Bansidhar v. Kharagjit* (5), *The Official Receiver v. Sankaralinga Mudaliar* (6), *Dronadula Sriramulu v. Ponakavira* (7), *Chittammal v. Ponnuswami* (8), *Jokhan Singh v. Deputy Commissioner of Fyzabad* (9), *Pita Ram v. Jujhar Singh* (10), *Irshad Husain v. Gopi Nath* (11), *Gaura v. Nawab Abdul Majid* (12), *Nilmoni v. Durga Charan* (13), *Official Receiver of South Arcot v. Perumal Pillai* (14), and *Ellis v. Silber* (15), referred to.

THE facts of the case fully appear from the judgments of the Court.

Pandit *Kapil Deo Malaviya*, for the appellant.

Munshi *Narain Prasad Asthana*, for the respondents.

DALAL, J. :—This reference to a Full Bench raises the question of jurisdiction of the insolvency court. The questions submitted to us for decision are :—

(1) Whether an insolvency court can try a question of title raised on the basis of a transfer which took place more than two years prior to the adjudication, having regard to the provisions of section 53 of the Insolvency Act?

(2) Would it make any difference if the receiver alleges that no transfer had been intended from the very beginning and no title had passed, the transaction being a mere paper transaction and void?

If the answer to the first inquiry is in the affirmative the second question will not arise.

Every Judge of this Court, except one, who had to consider the point has decided in favour of jurisdiction of the insolvency court, that is, the first question has

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| (1) (1921) I. L. R., 44 All., 71.   | (2) (1923) I. L. R., 43 All., 16.   |
| (3) (1926) I. L. R., 49 All., 71.   | (4) (1926) I. L. R., 48 All., 414.  |
| (5) (1914) I. L. R., 37 All., 65.   | (6) (1920) I. L. R., 44 Mad., 524.  |
| (7) (1923) 45 M. L. J., 105.        | (8) (1925) I. L. R., 49 Mad., 762.  |
| (9) (1913) 23 Indian Cases, 924.    | (10) (1916) I. L. R., 39 All., 626. |
| (11) (1919) I. L. R., 41 All., 378. | (12) (1920) 64 Indian Cases, 523.   |
| (13) (1918) 22 C. W.N., 704.        | (14) (1923) 79 Indian Cases, 322.   |
| (15) (1872) 8 Ch. App., 83.         |                                     |

been answered by him in the affirmative. The present section 4 of the Insolvency Act (No. V of 1920) is an addition to the previous insolvency statute law as laid down in Act No. III of 1907. The present Act came into force on the 25th of February, 1920, and on July 18th, 1921, a Bench of two Judges, Justices WALSH and WALLACH, had occasion to consider the scope of section 4 of the new Act. The case before the Court was one of a sale by the insolvent more than three years before the insolvency, with intent to defraud and delay his creditors. The learned Judges observed :—

“The District Judge has held, rightly, that it does not come within any of the express provisions of the insolvency law, and he has gone on to hold, erroneously, that a transaction cannot be attacked under the provisions of the Transfer of Property Act, or under general provisions of the law, in the insolvency court. Here he is wrong. The insolvency court has to administer the law under its own procedure and to decide questions arising in insolvency which are covered by special provisions of the Insolvency Act, where, for example, a trustee is given a higher title than the original debtor. But the insolvency court also has to apply, and to decide, all questions of general law, including such questions as are raised by section 53 of the Transfer of Property Act. That is one reason why the administration of insolvency is so onerous and imposes a very heavy burden on the district courts. If the receiver is right in fact, clearly this transaction was void under section 53 of the Transfer of Property Act, and the property attached by the receiver ought to be distributed as part of the estate among the creditors . . . There ought to be a full inquiry between the receiver and the creditor on one hand, and the debtor and his family on the other, as to the *bona fides* of this transaction. Whether you call it summary or not, it ought to follow the ordinary course of a suit. In the main, the provisions of the Code of Civil Procedure are applicable to such inquiry, and there ought to be sworn testimony and the same care used with regard to documents, and the admission or rejection of documentary evidence, as in a suit”.

(*Shikri Prasad v. Aziz Ali* (1)).

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Next in order comes a Bench case, *Maharana Kunwar v. E. V. David* (1), decided on the 3rd of July, 1923, by Justices LINDSAY and SULAIMAN. Both the Judges held that if a question of title is raised in the insolvency court, that court has jurisdiction to decide it. LINDSAY, J., stated at page 26 of the report: "All that section 4 intended to provide was that if a question involving title is raised before an insolvency court, then the insolvency court is to be deemed to have power to decide that question of title." The difference of opinion between the two Judges lay in this that SULAIMAN, J., was of opinion that if the matter was once decided even as against a stranger by the insolvency court, the jurisdiction of the civil court would be barred under section 11 of the Code of Civil Procedure. LINDSAY, J., was not prepared to take the view that a decision under sub-section (2) of section 4 would be binding upon a stranger who is not making any claim against the debtor or the debtor's estate.

On the 6th of July, 1926, the question as to the bar of the jurisdiction of the civil court came up before another Bench composed of SULAIMAN and BOYS, JJ., in which BOYS, J., agreed with the opinion of SULAIMAN, J., expressed in the case of *Maharana Kunwar*, and held that once the question of title was decided by the insolvency court the jurisdiction of the civil court was barred: *Kaniz Fatima v. Narain Singh* (2). Finally there was a difference of opinion between SULAIMAN, J., and MUKERJI, J., in *Hari Chand Rai v. Moti Ram* (3). As we have already seen, SULAIMAN, J., was of opinion that the jurisdiction of the insolvency court extended to all transactions raising questions of title, whatever their date may be, while MUKERJI, J., was of opinion that the provisions of section 4 were circumscribed by the provi-

(1) (1923) I. L. R., 46 All., 16. (2) (1926) I. L. R., 49 All., 71.

(3) (1926) I. L. R., 48 All., 414.

sions of section 53 of the Insolvency Act. The point of the opinion of MUKERJI, J., appears on page 420 of the report: "If the transaction is beyond two years, the receiver must seek his remedy by an ordinary civil suit instituted under section 53 of the Transfer of Property Act."

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I am in agreement with the opinion of SULAIMAN, J. As that learned Judge pointed out in the case of *Hari Chand Rai*: "Prior to Act V of 1920, when there was no provision corresponding to section 4 of the new Act, a Bench of this Court held that, even if a case did not fall under section 36 of the old Act of 1907, the court had power to inquire whether a disputed property was the property of the insolvent or not: *Bansidhar v. Kharagjit* (1). The Calcutta High Court had held otherwise, that a question of title could be disposed of by a regular suit only. The enactment of section 4 gives effect to the view which prevailed in this Court. Under section 4 power is given to the insolvency court to decide not only all questions of title or priority, but also of any nature whatsoever, whether they involve matters of law or fact, which may arise in any case of insolvency coming within the cognizance of the court or which the court may deem it expedient or necessary to decide for the purpose of doing complete justice." In a Bench ruling of the Madras High Court in *The Official Receiver v. Sankaralinga Mudaliar* (2) the jurisdiction of the insolvency court was considered under the Insolvency Act of 1907. SESHAGIRI AYYAR, J., observed at page 532 of the report: "There was a conflict of decisions in the various High Courts as to whether even without a provision similar to section 7 of the Indian Insolvency Act, the provincial insolvency courts had no jurisdiction to direct delivery of property to the receiver when it is moved by means of a petition.

(1) (1914) I. L. R., 37 All., 65. (2) (1920) I. L. R., 44 Mad., 524.



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Section 4 of the present Act has been so altered as to confer such a power. The amendment should not be regarded as if for the first time a new power had been conferred. I am of opinion that section 4 declares what has been the law all through." In the same case OLDFIELD, J., considered the provisions of the Act of 1907 in sections 36 and 37, corresponding to sections 53 and 54 of the present Act, and observed at pages 526-527 of the report: "Of the provisions in the Act relating to property held actually or colourably against insolvents, sections 36 and 37 merely prescribe a rule of evidence applicable to two classes of alienations, those completed within particular periods before the adjudication, not, like the sale now in question, after it, and it is material only that they assume and do not confer the power of cancellation, which they imply, but which must be looked for in another place." In *Dronadula Sriramulu v. Ponakavira* (1), there is an interesting discussion as to the scope of sections 36 and 37 of the Act of 1907 by VENKATASUBBA RAO, J., at p. 114. He has pointed out that the provisions of those sections corresponding to sections 53 and 54 of the present Act do not involve questions of jurisdiction but lay down rules of evidence under which an insolvency court is directed to draw an absolute and irrebuttable presumption like the one contained in section 112 of the Indian Evidence Act. As remarked by OLDFIELD, J., in the case of *The Official Receiver v. Sankaralinga* (2), we must look elsewhere than in sections 36 and 37 for jurisdiction of an insolvency court. Under the present Act a Bench of the Madras High Court held that it was open to an insolvency court on a proper application being made under section 4 of the Act to try the issue whether the insolvent is entitled to a certain property or not: *Chittammal v. Ponnuswami* (3).

(1) (1923) 45 M. L. J., 105.

(2) (1920) I. L. R., 44 Mad., 524.

(3) (1925) I. L. R., 49 Mad., 762.

It was argued before us on behalf of the appellant that the words "subject to the provisions of this Act" at the commencement of section 4(1) of the Act make section 4 subject to the provisions of section 53. I am of opinion that section 4 deals with jurisdiction, and the jurisdiction will be circumscribed only by such subsequent sections as deal with the jurisdiction of the court. As pointed out in the various judgements of the Madras High Court, sections 53 and 54 do not deal with the jurisdiction of the insolvency court, but only lay down rules as to the manner in which evidence should be considered in certain cases arising in that court. Those sections, therefore, in my opinion, do not control the provisions of section 4. These words are used to limit the power of the insolvency court as it is limited, for instance, by the proviso to section 56 that nothing in that section shall be deemed to authorize the court to remove from the possession or custody of property any person whom the insolvent has not a present right so to remove. This limitation is excellently illustrated by the case of *Chittammal* (1) of the Madras High Court. In this case the District Judge directed certain parties to hand over possession of the property in their possession to the official receiver. The Madras High Court held that this order was beyond the jurisdiction of the insolvency court by reason of the enactment of the second paragraph of clause (3) of section 56, unless the insolvent was entitled on the date when the receiver applied for possession to the possession of such property. The court cannot direct the person in possession to deliver up property if a title, however flimsy, is set up by the person in possession. This is the provision of the Act to which the provisions of section 4 are subject. In the same case the High Court declared that it was open to the insolvency court, on a proper application being made

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(1) (1925) I. L. R., 49 Mad., 762.

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under section 4 of the Provincial Insolvency Act, to try the issue whether the insolvent is entitled to the property or not, after proper opportunity is given to the other side to plead to the application.

For these reasons, my answer to the first question is in the affirmative. The second question, therefore, does not arise.

SEN, J.:—One Afzal Khan applied for being adjudicated an insolvent on the 7th of July, 1926. The adjudication order was passed on the 25th of March, 1927. The official receiver having attached a house as the property of the insolvent, one Anwar Khan intervened and claimed title to the house by right of purchase from Afzal, under a registered sale-deed dated the 1st of January, 1923. The receiver pleaded that the sale-deed was fictitious, that it was without consideration and that it had been executed in favour of a relation with a view to defraud the creditors. The trial court disallowed the objection of Anwar Khan upon the findings that the sale in his favour was a mere cloak to conceal the real ownership and that the insolvent was the owner of the property. On appeal to the lower appellate court it was urged that the sale having taken place more than two years from the date of adjudication, the receiver was not competent to challenge the sale under section 53 of the Provincial Insolvency Act and that the insolvency court had no power to annul the same. This contention was repelled by the lower appellate court, which held that the sale was "farzi," that no transfer was as a fact made in favour of the appellant and that section 53 of the Provincial Insolvency Act did not apply to a transaction like this. The appeal was, therefore, dismissed. Anwar Khan appealed to this Court and reiterated the pleas already referred to.

In view of the importance of the questions involved in the appeal, the learned Judges who heard the appeal

have referred the following points for decision by a larger Bench :—

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Sen, J.

(1) Whether an insolvency court can try a question of title raised on the basis of a transfer which took place more than two years prior to the adjudication, having regard to the provisions of section 53 of the Insolvency Act?

(2) Would it make any difference if the receiver alleged that no transfer had been intended from the very beginning and no title had passed, the transaction being a mere paper transaction and void?

Under section 9 of the Code of Civil Procedure, the ordinary civil courts have jurisdiction to try all suits of a civil nature, excepting suits the cognizance of which is either expressly or impliedly barred. Where there has been an infringement of a legal right, the ordinary civil courts are bound to entertain the claim, unless their jurisdiction has been ousted either by an express enactment or by necessary implication flowing either from statutory provisions or general principles of law.

Under section 53 of the Transfer of Property Act, where a transfer of an immoveable property has been made with intent to defraud . . . persons having an interest in such property or to defeat or delay the creditors of the transferor, it is voidable at the option of any person so defrauded, defeated or delayed.

The remedy of such a person is by a suit in the ordinary civil court of original jurisdiction.

The court of insolvency is a creature of statute. It is a special tribunal, having jurisdiction over a limited range of cases within such limits as have been imposed by the statute to which it owes its existence. Unless the

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Insolvency Act, expressly or by necessary implication, (1) took away the powers of ordinary civil courts to adjudicate upon the validity or otherwise of certain transfers which are sought to be impugned, either upon the ground of fraud or on the ground of want of consideration etc., and (2) invested the insolvency court with the powers of trial of such matters, the jurisdiction of the civil courts is not affected or impaired. The following statement of law is to be found in Maxwell's Interpretation of Statutes (sixth edition, 1920, p. 318): "Where an Act took away the right of bringing an action respecting certain disputes which were referred to the summary adjudication of justices, it was held that the subsequently established county courts acquired no jurisdiction to try such cases, under the general authority to try all pleas."

The limited nature of the jurisdiction of the court of insolvency is clear from the provisions of the Act itself, notably from sections 51, 53, 54 and 55. Section 51 deprives the execution creditor of the benefit of execution in certain circumstances in favour of the general body of creditors with reference to property not sold in execution "before the date of the admission of the petition." Section 54 provides that transfers made in favour of the creditor with a view of giving that creditor a preference over other creditors shall be deemed fraudulent and void as against the receiver and shall be annulled by the court, if the transfer in question is within three months of the presentation of the petition for insolvency. The jurisdiction of the insolvency court depends upon the fulfilment of the conditions contained in the section.

Section 55 affords protection to transfers made by the insolvent before the date of the order of adjudication if they are *bonâ fide* and for consideration, the transferee not having had notice of the presentation of an insolvency petition. It is to be noticed that no power is hereby

conferred upon the court of insolvency to displace a transfer which has taken place before the presentation of the petition for insolvency. Section 53 aims at only such transfers which have been made within two years of the date of the order of adjudication.

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Sections 53 and 54 do not merely lay down a rule of substantive law or a rule of evidence favouring the official receiver, but confer a jurisdiction upon the court of insolvency with reference to only such transfers as are mentioned in those sections and upon the fulfilment of the conditions contained therein, without which the receiver has no right to challenge the transfers nor has the court a power to annul the same.

Sen, J.

Section 53 of the Provincial Insolvency Act (Act V of 1920) corresponds to section 36 of the old Act (Act III of 1907). The rule of law enacted by the section is analogous to section 42 of the English Bankruptcy Act, 1883, which runs as follows :—

(1) Any settlement of property, not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or encumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt *within two years* after the date of the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy etc., . . . . .

(3) "Settlement" shall for the purpose of this section include any conveyance or transfer of property.

It will thus appear that both under the English and the Indian law, a settlement or transfer of property can be annulled by the insolvency court at the instance of the official receiver or the trustee in the bankruptcy upon the transfer conforming to the conditions mentioned in the



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Act, one of which is that the transfer had taken place within a certain period either from the date of the settlement or the order of adjudication.

The reason is obvious for prescribing a time-limit in cases where the Act starts with a presumption against the validity of such transfers. In a suit under section 53 of the Transfer of Property Act, the onus lies upon the transferee to prove that the transfer was not to defraud the prior or subsequent transferees or to defeat or delay the creditors. But there is no presumption of law against the transferee, except where a transfer is made gratuitously or for a grossly inadequate consideration. Under section 53 of the Provincial Insolvency Act, the question of the intent to defraud, defeat or delay is outside the inquiry and the official receiver has the right of avoidance if the transfer is within two years of the order of adjudication.

The principle underlying the fixation of time in sections 53 and 54 is that where the transfer precedes the insolvency proceeding by a short period, it may be reasonably assumed that the financial difficulties of the insolvent had already commenced, that he anticipated that the crash was coming and resorted to these transfers in order to place his property beyond the reach of creditors. No presumption should reasonably be raised against his financial soundness more than two years before the date of adjudication. A time limit in a statute must necessarily be an artificial rule, but the limit of two years is not unreasonable.

Under Act III of 1907, the trend of decisions on the powers of the insolvency court has not been uniform. In *Jokhan Singh v. Deputy Commissioner of Fyzabad* (1), Piggott, J. C., held that the intention of the legislature was only to give the Judge, sitting in insolvency,

(1) (1913) 23 Indian Cases., 924.

jurisdiction under section 36 of Act III of 1907 in respect of transfers made within two years of the date of the order of adjudication.

In *Bansidhar v. Kharagjit* (1), where the transaction had been entered into by the predecessor in title of the insolvent more than two years before the adjudication of the insolvency, CHAMIER and PIGGOTT, JJ., held that the court had inherent power to inquire whether the disputed property in possession of the transferee was the property of the insolvent, that it was the duty of the receiver to move the court and the court was competent under section 18 of the Act to remove the transferee from possession and to vest it in the receiver. Their Lordships noticed that the Indian Provincial Insolvency Act contained no provision as section 102 of the English Bankruptcy Act which expressly empowered the Bankruptcy Court to decide "all other questions whatsoever whether of law or of fact which may arise in any case of bankruptcy coming within the cognizance of the court, or which the court may deem it expedient or necessary to decide for the purpose of doing complete justice and making a complete distribution of property in any such case." The judgment of the court therefore proceeded upon the assumption of an inherent jurisdiction.

In *Pita Ram v. Jujhar Singh* (2), PIGGOTT and WALSH, JJ., held that the insolvency court had *concurrent jurisdiction* with the ordinary civil court to enter into a question of the legality of attachment against a person who is a stranger to the bankruptcy. This would appear from the following observations: "Now it is to be observed that in accordance with the English bankruptcy practice, a person in the position of the plaintiff in this action, who is a stranger so to speak to the bankruptcy and whose property has been seized wrongfully,

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(1) (1914) I. L. R., 37 All., 65.

(2) (1916) I. L. R., 39 All., 626.



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according to his view of the case, by the receiver in bankruptcy is not confined to the remedy given him by the Provincial Insolvency Act. He can, if he pleases, apply to the insolvency court inasmuch as section 22 applies in express terms to his grievance. But he can if he pleases ignore the insolvency court and sue in a civil court for return of his property in an ordinary action against a trespasser" . . . "The question which is an important one is by no means free from difficulty." It may be doubted if it was at all necessary, and if the legislature could ever have intended, to invest two courts of co-ordinate jurisdiction with the same powers over the same matter. The decision in this case proceeded upon the application of the doctrine of *res judicata*.

In *Irshad Husain v. Gopi Nath* (1) RICHARDS, C.J., and BANERJI, J., followed this ruling, but with considerable reluctance. Since finality is claimed for the decision of the insolvency court on the question of title affecting a third party, this decision is not without its relevancy to the question now under consideration. They observed: "If we had to consider the matter in the absence of any authority, we doubt very much whether the order of the insolvency court and the court of appeal from that order can operate as *res judicata*". Unless the object of the legislature was to invest the insolvency court with summary powers analogous to those conferred upon the ordinary civil courts under order XXI, rule 58, of the Code of Civil Procedure, no purpose could have been served in clothing the insolvency court with powers so narrow and limited.

In *Gaura v. Nawab Abdul Majid* (2), PIGGOTT and WALSH, JJ., held that where a transaction is seven years old, it cannot be questioned by a receiver or creditor under section 36 of the Insolvency Act and the proper

(1) (1919) I. L. R., 41 All., 378.

(2) (1920) 64 Indian Cases, 523.

remedy is to institute a suit under section 53 of the Transfer of Property Act. They observed that this case was the converse case to that of *Pita Ram*, already referred to.

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In *Nilmoni v. Durga Charan* (1), a Bench of the Calcutta High Court, in a comprehensive decision which examined all the authorities, refused to follow the decision of this Court in *Bansidhar v. Kharagjit* (2). It noticed that no power was to be found in the Provincial Insolvency Act corresponding to section 102 of the English Act of 1883.

In this state of authorities, it was necessary to sufficiently define the powers of the insolvency court, and when the Act was amended in 1920, section 4 was added in consequence.

It is contended on behalf of the respondents that section 4 confers upon the court of insolvency full powers to decide all questions whether of title or priority or of any nature whatsoever and whether involving matters of law or fact, and it is contended that the decisions of the insolvency court are clothed with finality under the express provision of section 4, sub-section 2. A court of insolvency has ordinarily a jurisdiction to decide all matters affecting a claim between the insolvent and the creditors. But some exceptions have been grafted upon this general rule which are to be found in sections like 51, 53 and 54, which have been referred to already. The powers of the insolvency court are controlled and restricted by these sections, and the opening words of section 4, clause (1), "subject to the provisions of this Act" have been deliberately introduced by the legislature to indicate and define the extent of the jurisdiction which was intended to be conferred upon the court of insolvency. If the insolvency court is competent to determine the legality

(1) (1918) 22 C. W. N., 704.

(2) (1914) I. L. R., 37 All., 65.

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and propriety of transfers which had taken place more than two years before the order of adjudication, there could have been no object in prescribing a shorter term in section 53 of the Act. Section 4 is an enabling section in the sense that it defines the competence of the court and the extent of its jurisdiction. The powers of the ordinary civil courts to entertain suits relating to the title of third parties cannot be defeated or extinguished except by statutory enactment. Section 4 does not purport to do this. Under sub-section (2) finality attaches to only such decisions of the insolvency court as are *intra vires*. I would, therefore, respectfully differ from the judgement of SULAIMAN, J., in *Maharana Kunwar v. E. V. David* (1). I share the view of LINDSAY, J., at page 26—"I am not prepared to take the view that a decision under sub-section (2) of section 4 would be binding upon a stranger like the plaintiff in the present case, who, in my opinion, is not making any claim against the debtor or the debtor's estate;" and at page 28—"In the present case I am satisfied (1) that the plaintiff was under no obligation to seek any relief in the insolvency court; (2) that she had the ordinary remedy under the civil law against the official receiver; and (3) that for the purpose of maintaining the suit she was under no obligation to seek any sanction from the insolvency court." It is to be observed that no question arose in this case as to the legality of transfer more than two years before adjudication and the observations of the learned Judges were mere *obiter*. But the question directly arose in *Hari Chand Rai v. Moti Ram* (2). SULAIMAN, J., adhered to his view expressed in I. L. R., 46 All., 16. I am not quite sure that the enactment of section 4 gives effect to the view which prevailed in this Court when Act III of 1907 was in force. Section 4 defines and restricts the

(1) (1923) I. L. R., 46 All., 16.

(2) (1926) I. L. R., 48 All., 414.

jurisdiction of the court of insolvency. The transferee does not represent the debtor and the debtor's estate and cannot be said to be a claimant against the debtor in the insolvency proceedings. "Subject to the provisions of this Act" ought to be construed in their natural and grammatical sense and ought not to be narrowed down to a mere right of appeal. I respectfully differ from this decision and from the later decision in I.L.R., 49 All., 71 and agree with the decision of MUKERJI, J., in I. L. R., 48 All., 414.

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In *Shikri Prasad v. Aziz Ali* (1), the construction of section 4 of Act V of 1920 was not in issue and the Court did not consider the meaning or effect of the words "subject to the provisions of this Act" in sub-section (1) nor of the words "for all purposes as between, on the one hand, the debtor and the debtor's estate and, on the other hand, all claimants against him or it and persons claiming through or under them or any of them." These important words of limitation have evidently been lost sight of by the learned Judges who decided that case. The above remarks apply to the decision of OLDFIELD and AYYAR, JJ., in *the Official Receiver v. Sankaralinga* (2). Their Lordships were considering the powers of the insolvency court under sections 16 and 18 of Act III of 1907 and were of opinion that the Court had jurisdiction to adjudicate upon the title of a third party independent of section 4 of Act V of 1920,—“I am of opinion that section 4 declares what has been the law all through.” The limitation upon the powers of the insolvency court within the Act have not been considered or discussed.

In *Dronadula Sriramulu v. Ponakavira* (3), all that was decided was that the general power of the court of insolvency was exercisable to inquire into the validity of a secured debt independently of sections 30 and 37. Those sec-

(2) (1921) I. L. R., 44 All., 71.

(2) (1920) I. L. R., 44 Mad., 524.

(3) (1923) 45 M. L. J., 105.

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tions were only rules of evidence applicable to particular kinds of transfer by the insolvent. VENKATASUBBA RAO, J., observed: "The arguments covered a wide ground, and the question that was raised was whether the insolvency court has jurisdiction under the Provincial Insolvency Act, III of 1907, to *adjudicate upon claims of third parties* as against the insolvent or his estate represented by the receiver. I must state at once that, in my opinion, this question does not arise at all in the present case, and that the matter before us can be decided on a ground very different from the one stated." This decision, therefore, cannot be of very great value in the present case. The learned Judge further observes: "The court has to prepare a schedule of creditors which may be amended from time to time and this function cannot be properly or adequately performed unless the court has equal power to deal with secured as well as unsecured debts. *To a proceeding appropriate to this inquiry the parties are not a person subject to the insolvency court and a stranger*". The last observation is in accord with my view of the matter. In *Chittammal v. Ponnuswami* (1), the judgement does not proceed upon a construction of the language of subsections (1) and (2) of section 4 of Act V of 1920, which have already been referred to. The decision, however, recognizes the fact that restrictions have been imposed upon the power of the court of insolvency, such as under section 56 (3). DEVADOSS, J., observed at page 764: "But where the person in possession claims adversely to the insolvent, or where he is able to show that the insolvent is not entitled to present possession, the court has no power to proceed under section 56 etc". Further, at page 767: "In a recent case, *Official Receiver of South Arcot v. Perumal Pillai* (2), it was decided by SPENCER, J., and myself that the power given by section 4

(1) (1925) I. L. R., 49 Mad., 762. (2) (1923) 79 Indian Cases, 322.

of the Provincial Insolvency Act is subject to the provisions of the Act, one of which is the proviso to section 56 (3), which is in the way of the court removing any person from the possession of property whom the insolvent has no present right to remove". If section 56 imposes restrictions upon the power of the court of insolvency, why not section 53?

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The Insolvency Acts in this country were modelled upon the English Bankruptcy Act, and section 4 of Act V of 1920 is practically a reproduction of the corresponding section of the English Acts of 1914, 1883 and 1871. In *Ellis v. Silber* (1), Lord SELBORNE made the following observations :—

"The effect of the provisions in the several Acts of Parliament relating to bankruptcy is that in these cases of arrangement-deeds which have been registered in bankruptcy, the trustee for the purpose of administration under the deed has all the powers and all the rights in the Court of Bankruptcy which assignees or trustees under a regular bankruptcy would have. and that for all the purposes of administration in bankruptcy the Court of Bankruptcy is armed with very large powers, both legal and equitable,—as large as may be necessary to do complete justice. But there was no case cited and no clause quoted from any Act of Parliament to the effect that whenever the trustee of a deed or the trustee or assignee in bankruptcy has a demand against a third person, which but for the bankruptcy would be proper to be prosecuted in a court of law or in a court of equity, the jurisdiction of the court of law or of the court of equity is as against that third person transferred to the Court of Bankruptcy. I apprehend that there is nothing whatever in the Acts relating to bankruptcy which in an ordinary case not governed by the special clauses of the Act has any such effect." "That which is to be done in bankruptcy is the administration in bankruptcy. The debtor and the creditors, as the parties to the administration in bankruptcy, are subject to that jurisdiction. The trustees or assignees, as the persons entrusted with that administration, are subject to that juris-

(1) (1872) 8 Ch. App., 83.



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diction. The assets which come to their hands and the mode of administering them are subject to that jurisdiction; and there may be, and I believe are, *some special classes of transactions which, under special clauses of the Acts of Parliament, may be specially dealt with as regards third parties*. But the general proposition, that whenever the assignees or trustees in bankruptcy or the trustees under such deeds as these have a demand at law or in equity as against a stranger to the bankruptcy, then that demand is to be prosecuted in the Court of Bankruptcy, appears to me to be a proposition entirely without the warrant of anything in the Acts of Parliament, and wholly unsupported by any trace or vestige whatsoever of authority".

These observations are applicable in their entirety to the provisions of the Provincial Insolvency Act and specially to sections 53 and 4.

My answer to the reference is :—

(1) An insolvency court cannot try a question of title relating to a transfer which has taken place more than two years before the order of adjudication, having regard to the provisions of section 53 of the Insolvency Act.

(2) Where the transfer was intended to be operative from the beginning and the insolvent had remained in possession of the property, the receiver may apply for its annulment. But where the transfer was executed by a proper instrument and was duly registered and was intended to put the property beyond the reach of the creditors, and a third party is claiming under the transfer, such a transaction cannot be treated as a mere paper transaction. In the latter case, section 53 of the Insolvency Act will apply.

KING, J. :—I have had the advantage of studying the foregoing judgements of my learned brothers. I fully

agree to the view expressed by DALAL, J., but as it is diametrically opposed to the opinion formed by SEN, J., I feel it necessary to state my reasons.

The main question is whether an insolvency court can decide the validity of a transfer made by the insolvent more than two years before the order of adjudication.

The answer depends upon the interpretation of section 4(1) read with section 53 of the Provincial Insolvency Act, 1920.

Section 4(1) appears to me to give to the insolvency court the widest possible powers to decide all questions of title arising in a case of insolvency. In the present case the question was whether certain property belonged to the insolvent, notwithstanding the fact that he purported to have sold the property to the objector more than two years before the order of adjudication. This was a question of title arising in a case of insolvency, and was moreover a question which the court might have deemed it expedient or necessary to decide for the purpose of doing complete justice, or of making a complete distribution of the property. *Primâ facie*, therefore, the insolvency court undoubtedly was empowered under section 4(1) to decide the question.

The question then arises whether the opening words of section 4(1), namely "subject to the provisions of this Act", when read with section 53, have the effect of restricting the jurisdiction of the insolvency court, so as to prohibit it from deciding the validity of a transfer made by the insolvent more than two years before the order of adjudication. In my opinion this question must be answered in the negative.

Section 53 is one of a group of sections, namely sections 51 to 55 (both inclusive), which come under the heading "Effect of insolvency on antecedent trans-

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actions''. They lay down certain rules of law applicable to transactions affecting the property of a person who is subsequently adjudged an insolvent. Under section 53, for instance, a sale of the insolvent's property, if made within two years before the order of adjudication, can be set aside as against the receiver, unless the sale was made in good faith and for valuable consideration. This merely lays down a rule of law affecting transactions that fall within its scope. It shows that an order of adjudication affects certain transactions entered into within a period of two years, but no longer. The insolvency court will of course apply this rule to any case that falls within its scope, but I am unable to interpret this rule as restricting the jurisdiction conferred upon the court by section 4(1) "to decide all questions, whether of title or priority, or of any nature whatsoever".

In my opinion sections 51 to 55 do not restrict, or purport to restrict, the wide jurisdiction conferred by section 4(1). They merely enact rules which define the effect of insolvency upon antecedent transactions and which must be followed by insolvency courts whenever the rules are applicable.

In the present case section 53 does not apply, since the sale was transacted more than two years before the order of adjudication. Hence the insolvency court certainly cannot annul the sale under section 53, but I see no reason why the insolvency court should not annul it under the general law (*e.g.*, under section 53 of the Transfer of Property Act) if it is liable to annulment by a civil court.

The intention of the legislature in enacting section 4(1) seems to have been to confer upon the insolvency court full powers of deciding all questions of title that arise for decision in cases of insolvency, so that there should be no necessity for having recourse to the ordinary

civil courts. The object probably was to avoid multiplicity of suits and proceedings. Before that section was enacted in 1920 there was a conflict of judicial opinion as to whether the court had power to determine whether a disputed property belonged to the insolvent or not. The Calcutta High Court held that the question of title could only be determined by a regular suit. I take it that section 4 was enacted so as to make it clear that questions of title could be determined by the insolvency court and that there was no necessity to have the question determined by a regular suit.

But, it is urged, what is the meaning of the words "subject to the provisions of this Act" in section 4? Are they not intended to restrict the jurisdiction of the court to dealing with special cases in which the special provisions of the Act are applicable? I am unable to read the words in this restrictive sense. They may refer to the rules of procedure and appeal laid down in the Act itself. They doubtless refer to the special rules laid down in sections 51 to 55, meaning that the court should follow those rules whenever they are applicable. They may also refer to section 81 under which the Local Government can bar the application of many provisions of the Act, including (for instance) the provisions contained in sections 51 to 55. They may also refer to such limitation of the power of the court as is contained in the proviso to section 56(3). I see no difficulty, therefore, in giving a meaning and effect to the words "subject to the provisions of this Act" without construing them in the restrictive sense suggested by my learned brother SEN, J. In my opinion they do not bar the jurisdiction of the insolvency court to decide a question of title under the ordinary law when the special provisions of the Act do not apply.

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I am fortified in this opinion by the previous decisions of this Court. As pointed out by my learned brother DALAL, J., "Every Judge of this Court, except one, who had to consider the point has decided in favour of jurisdiction of the insolvency court."

I approve the decisions in *Shikri Prasad v. Aziz Ali* (1), *Maharana Kunwar v. E. V. David* (2), *Kaniz Fatima v. Narain Singh* (3), and the opinion of SULAIMAN, J., in *Hari Chand Rai v. Moti Ram* (4). I must record my respectful dissent from the opinion expressed by MUKERJI, J., in the last-mentioned case, that "if the transaction is beyond two years, the receiver must seek his remedy by an ordinary civil suit instituted under section 53 of the Transfer of Property Act."

I agree with DALAL, J., that the first question submitted to this Full Bench should be answered in the affirmative, and that the second question does not arise.

BY THE COURT.—In the opinion of the majority of the Judges of this Full Bench the first question submitted to them should be answered in the affirmative, and, in consequence, the second question does not arise.

(1) (1921) I. L. R., 44 All., 71.

(2) (1923) I. L. R., 46 All., 16.

(3) (1926) I. L. R., 49 All., 71.

(4) (1926) I. L. R., 48 All., 414.

## APPELLATE CIVIL.

*Before Mr. Justice Ashworth and Mr. Justice King.*

MADAN LAL AND OTHERS (PLAINTIFFS) *v.* GAJENDRAPAL  
SINGH (DEFENDANT).\*

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*Civil Procedure Code, order XLI, rule 33—Whether appellate court can pass decree against a person not party to the appeal—Hindu law—Alienation by manager—Right of transferee from coparceners to question the alienation.*

Order XLI, rule 33, of the Code of Civil Procedure does not authorize the passing of a decree against a person who is not a party to the appeal, though it allows a decree in favour of a plaintiff who has not appealed.

A transferee of any property or interest in property from a coparcenary body acquires along with that property or interest the right of the coparcenary body to call in question a previous alienation made by the manager of the family, otherwise than for legal necessity, for the purpose of protecting or defining the property or interest acquired. Hence, where a manager executed a mortgage without legal necessity, and subsequently the coparceners executed a second mortgage in which no mention was made of the first, and the second mortgagees obtained a decree for sale on their mortgage and at execution sale purchased the property subject to the first mortgage, it was *held* that the second mortgagees were entitled to impugn the validity of the first mortgage, it being necessary to do so in order to define their interest; they could also claim to avoid as being by their purchase the successors in interest to the coparceners of the right to avoid.

*Rukia v. Mewa Lal* (1), doubted. *Nannu Prasad v. Nazim Husain* (2), *Muhammad Muzamil-ullah Khan v. Mithu Lal* (3), *Jagesar Pande v. Deo Dat Pande* (4), *Sarju Prasad Rao v. Mangal Singh* (5), *Raj Ballaw v. Dalip Narain Singh* (6), *Subba Gounden v. Krishnamachari* (7).

\* Second Appeal No. 195 of 1926, from a decree of R. L. Yorke, District Judge of Bulandshahr, dated the 16th of December, 1925, reversing a decree of Kashi Nath, Subordinate Judge of Bulandshahr, dated the 19th of September, 1924.

(1) (1928) I. L. R., 51 All., 63.

(2) (1927) I. L. R., 50 All., 517.

(3) (1911) I. L. R., 33 All., 783.

(4) (1929) I. L. R., 45 All., 654.

(5) (1925) I. L. R., 47 All., 490.

(6) (1926) A. I. R., (All.), 718.

(7) (1921) I. L. R., 45 Mad., 449.

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*Nasir-uddin v. Ahmad Husain* (1), referred to. *Durga Prasad v. Bhajan* (2), distinguished.

THE facts of the case are fully set forth in the judgment of the Court.

Maulvi *Iqbal Ahmad* (with him *Munshi Jang Bahadur Lal* and *Munshi Shiva Prasad Sinha*), for the appellants.

*Munshi Shambhu Nath Seth* (with him *Babu Peary Lal Banerji* and *Pandit Uma Shankar Bajpai*), for the respondent.

ASHWORTH and KING, JJ. :—This appeal is by the plaintiffs. It arises out of a suit for sale of property mortgaged under a mortgage-deed dated the 3rd of May, 1912, executed by one *Ganeshi Lal*, defendant No. 1, in favour of *Paras Ram* father of the plaintiffs appellants for Rs. 900. There are three sets of defendants, namely *Ganeshi Lal* defendant No. 1, first party; his sons, defendants Nos. 2 to 5, second party; and defendants Nos. 6 to 13, subsequent transferees of the mortgaged property, third party. The respondent *Gajendrapal Singh* is one of the subsequent transferees. He was the only defendant to contest the suit. He did so on the ground that the mortgage by *Ganeshi Lal* in favour of the plaintiffs was invalid for want of consideration and also of legal necessity. The trial court rejected this defence and decreed the suit in favour of the plaintiffs appellants. *Gajendrapal Singh* respondent appealed. The District Judge of *Bulandshahr*, came to a finding that the actual consideration paid for the mortgage was Rs. 550 but that even for this sum there was no legal necessity. Accordingly he allowed the appeal and set aside the decree of the trial court. He set aside that decree not only as against *Gajendrapal Singh* the appellant but as against all the defendants, that is to say as against the rest of the defendants who had not contested the suit.

(1) (1926) 25 A. L. J., 20.

(2) (1919) I. L. R., 42 All., 50.

The plaintiffs, i.e. the first mortgagees, have filed this second appeal to the High Court, asking for the restoration of the trial court's decree as against all the defendants. But they have impleaded only Gajendrapal Singh out of the defendants. This respondent has raised, as a preliminary objection to the appeal, the contention that this is not permissible. The decree of the lower appellate court is a decree against all the transferees. Indeed a decree in favour of the plaintiffs must inevitably be a decree against all or none of the co-transferees.

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In reply to this objection counsel for the appellants invokes order XLI, rule 33, which enacts that an appellate court shall have power to pass any decree which ought to have been passed, and that this power may be exercised "in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection." Now it is obvious that this provision will not assist the appellants unless it is construed to mean that the appellate court can pass a decree against a person who has not been made a respondent. On behalf of the respondent it is contended that the word "parties" in the rule must be construed to mean "parties to the appeal" and that no decree can be passed either for or against a person who although a party to the suit is not a party to the appeal. There is, no doubt, the authority of *Rukia v. Mewa Lal* (1), recently decided by a two-Judge Bench of this Court, for holding that the word "parties" in order XLI, rule 33, "was not intended to connote persons other than those who had been arrayed as appellants or respondents in the appeal." If it were necessary to hold thus, for the disposal of the present objection, we should have much hesitation in following this decision, or holding that it was rightly decided. The rule, in our opinion, clearly allows a decree in favour of a plaintiff who has not appealed.

(1) (1928) I. L. R., 51 All., 63.



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Otherwise we should have found in the rule in the place of the words "all or any of the respondents or parties" the words "all or any of the appellants or respondents". Order XLI, rule 4, permits a decree in favour of a plaintiff who has not appealed against a respondent where another plaintiff has appealed on a ground common to both plaintiffs, and there can be no reason for not allowing a decree in favour of a plaintiff who has not appealed when the decree is one not asked for but one that ought to have been passed. But the question that arises is whether a decree can be passed *against* a person who is no party to the appeal. Rule 33 states that the appellate court shall have power to pass any decree which ought to have been passed, and this is wide enough to allow a decree against a party to the suit who is not a party to the appeal. But the rule, by using the expression "in favour of all or any of the respondents or parties", seems to imply that the rule shall not be used to the prejudice of a person who is not a party to the appeal. This is consonant with equity. A person who has been heard in the appeal cannot object to a decree in favour of a person, merely because that person is not a party to the appeal, whereas it would appear inequitable to pass a decree against a party who has no chance of being heard in the appeal. It has been argued for the appellants that the lower appellate court's decree was only in favour of Gajendrapal Singh, and consequently the present appellants could only appeal against him. This is to repeat a fallacy pointed out in a recent decision of a two-Judge Bench of this Court on which one of us sat, namely *Nannu Prasad v. Nazim Husain* (1). It was there pointed out that there can be only one decree in a suit existing at any one time, and that a trial court's decree after an appeal was replaced by the decree of the appellate court, whether the appellate court's judgement resulted in a totally different decree

(1) (1927) I. L. R., 50 All., 517.

or only in a decree having the effect of modifying the trial court's decree. In the present case the effect of the lower appellate court's judgement was to bring into existence a decree in favour of all the transferees and not only in favour of Gajendrapal Singh. It was, therefore, necessary for the appellants to make all the transferees respondents in order to get set aside the decree of the lower appellate court. Not having done so, they cannot be allowed to ask us to pass a decree against not only Gajendrapal Singh but also against the other transferees.

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This objection then appears to us to be fatal to this appeal as brought. But counsel for the appellants has asked us to allow him to add the names of the other transferees defendants as respondents if we hold that it is necessary to do so. The question of the propriety of our doing so will not arise if we hold that the appeal should be dismissed on its merits, and consequently we proceed to consider the grounds taken in the memorandum of the appeal. Four grounds are set out. The fourth, maintaining that the sons of Ganeshi Lal were under a pious obligation to pay the debt in dispute, has not been pressed and clearly had no chance of success on the findings of fact of the lower appellate court. The first plea, namely that the District Judge was not entitled to reverse the trial court's decree as against those defendants who did not appeal to him, is clearly unsustainable in view of the provision of order XLII, rule 4, of the Civil Procedure Code which authorizes an appellate court, in a case like this, to reverse, in favour of all the defendants to a suit, a decree of the trial court against them. The two remaining pleas respectively are (1) that it was not open to the transferees to impugn the mortgage in suit, on the ground of its being executed by a manager of the family otherwise than for legal necessity, the contention being that the right of avoidance is restricted to



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the coparceners and cannot be passed on to their transferees, and (2) that in view of the fact that in a previous suit, when the respondent Gajendrapal Singh and his cotransferees were suing on a second mortgage, they had entered into a compromise with the appellants as first mortgagees that the property should be sold in pursuance of the second mortgage but subject to the first mortgage, it was not open to Gajendrapal Singh, etc. to impugn the validity of the first mortgage. Although these pleas are taken in the memorandum of appeal in the inverse order, we find it convenient to discuss them in this order, since for the decision of the latter plea we shall require to invoke certain legal conclusions arrived at in our discussion of the former.

The argument is that the right of coparceners (in this case the sons) to avoid a transfer made by the managing member of the family (in this case the father) on the ground that it was made without legal necessity is a right restricted to the coparceners, which cannot be assigned by them to other persons and which does not pass along with the interest of the coparceners when that interest passes to strangers either by voluntary sale or by a sale by the court in execution of a decree. There was a certain amount of argument as to whether a transfer by a manager otherwise than for legal necessity was void or merely voidable, but it was agreed that it was now to be taken as settled law that it is only voidable. There is such a weight of authority in favour of this that it does not appear to us to be necessary to cite any decision. The question, however, is whether such a transfer is liable to be avoided merely by the sons or coparceners, or whether it may be avoided by transferees of the interest in the property of the coparceners. A Full Bench of this Court in *Muhammad Muzamil-ullah Khan v. Mithu Lal* (1), in 1911, decided with no uncertain voice

(1) (1911) I. L. R., 33 All., 788.

in favour of the transfer being voidable by transferees of the coparcener's interest. In that case the head of a joint Hindu family had mortgaged property belonging to the joint family, but neither for legal necessity nor to pay an antecedent debt. Subsequently the mortgagor sold the property to a third person who remained in possession for more than 12 years. RICHARDS C.J., held that the transferee of the property by the subsequent transfer having acquired title against the coparcenary body by 12 years' adverse possession must be deemed a transferee of the coparcenary body, and held that such transferee could avoid the mortgage. BANERJI, J., held that the fact of the coparceners having allowed the transferee under the subsequent transfer to remain in possession raised a presumption that the sale to him was for family necessity and with the assent of the other members. CHAMIER, J., held that although their Lordships of the Privy Council, in the case of *Balgobind v. Narain Lal* (1), had by their language suggested that the mortgage was voidable and not absolutely void, yet until there was a definite pronouncement on the point by the Privy Council he was bound by the Full Bench decision of this Court in *Chandradeo Singh v. Mata Prasad* (2), to hold that the transfer was absolutely void and not merely voidable. Consequently he held that the question did not arise whether, if it was voidable, it was voidable only by the coparceners themselves and not by their transferees. He added, however, as an *obiter dictum* that assuming that a transferee of the coparcenary body could question an assignment by the manager, a transferee in possession could only do so "if a trial of its validity was necessary for his protection against the claim of another person". The context clearly showed that by the words "for his protection" he meant "for the protection of his particular possessory interest." The

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(1) (1893) I. L. R., 15 All., 339. (2) (1909) I. L. R., 31 All., 176.

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condition laid down in this *obiter dictum* appears to us sound but not to go far enough. We think that the transferee can use the power of avoidance not merely for the protection of the particular right or interest transferred to him but also for the definition of that interest, when there can exist a doubt as to the quantum or nature of the interest acquired by him.

It is clear then that the majority of the Full Bench in that case held that transfer by a manager otherwise than for legal necessity could be avoided by the transferees of the coparceners, and it was held by one Judge, namely RICHARDS, C.J., that it was voidable even by persons who had acquired the title of the coparceners merely by adverse possession. The case of *Jagesar Pande v. Deo Dat Pande* (1) has been cited, but does not appear to us relevant. In that case it was held that where a certain person had, as manager of the family consisting of himself and his son, made a deed of gift in favour of his widow, the reversioners could not call in question the deed of gift, as the only persons who could do so would be the coparceners, and the reversioners had not yet acquired the coparcenary interest. The decision has probably been cited because it contains the passage "there is ample authority for the view that an alienation by the manager of a joint Hindu family is not absolutely void. It is voidable at the instance of the persons whose interests are affected by it, namely the coparceners in the property." But the context left it open whether by the expression "the coparceners in the property" the Judges included or excluded the transferees of the coparceners. It was immaterial to decide this question for the purposes of that case. The next case cited is *Sarju Prasad Rao v. Mangal Singh* (2). It was there held that a next reversioner could challenge a

(1) (1923) I. L. R., 45 All., 654. (2) (1925) I. L. R., 47 All., 490.

mortgage executed by a father as manager of a joint Hindu family consisting of himself and his son and could challenge a decree obtained through fraud or collusion against the mortgagor's widow. The use of the term in the judgement "next reversioner" seems to suggest that the widow was alive. If so, this decision was in direct conflict with *Jagesar Pande v. Deo Dat Pande* just noticed. This decision is at any rate authority for holding that the reversioners who come into property on the death of a widow are entitled to challenge a transfer made by the manager of the family whose rights they inherit. Reliance is placed on the Full Bench decision of *Muhammad Muzamil-Ullah Khan v. Mithu Lal* (1) referred to above.

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The last-mentioned Bench decision was again followed more recently by a two-Judge Bench of this Court on which one of us sat, namely *Raj Ballaw v. Dalip Narain Singh* (2), where it was held that a transferee of the whole interest in joint family property, by an execution sale under a money decree, is entitled to contest the validity of a transfer made by one of the members of the family on the ground of want of legal necessity. In *Subba Goundan v. Krishnamachari* (3) it was held that a sale by a father or managing member of a joint family for alleged necessity will be good till avoided, as it is open to the other coparceners to affirm the transaction. This decision is only of importance in the present connection, owing to the fact that it states that the coparceners may affirm the transaction, which we take to mean that an affirmation by the coparceners raises an un rebuttable presumption that the alienation was for necessity, and we agree with the proposition in this sense.

There remains the only decision by the Privy Council bearing on the point which we can discover. This is the case of *Nasir-Uddin v. Ahmad Husain* (4). In that

(1) (1911) I. L. R., 33 A.L., 783.

(2) (1926) A. I. R., (All.), 718.

(3) (1921) I. L. R., 45 Mad., 449.

(4) (1926) 25 A. L. J., 20.

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case a Hindu father as head of a joint family contracted to sell certain property to the plaintiffs but subsequently sold it to one set of the defendants in breach of his earlier contract. A suit for specific performance was brought by the plaintiffs against the father and the subsequent purchasers. The subsequent purchasers pleaded that the contract in favour of the plaintiffs was an improvident one, that is to say, was a contract to sell for an insufficient sum. It was accepted that the coparceners could have avoided the contract on this ground. A two-Judge Bench of the Allahabad High Court had held that the subsequent purchasers, as being only transferees of the coparceners, could not call in question the validity of the contract. Their Lordships stated that they "are not satisfied that the Judges in the appellate court were right upon this; but they did not feel it necessary to pronounce upon this point". They decided the case on the ground that the contract was for sale at a sufficient price. We cannot but regard the remarks by their Lordships in this case as at least showing that at the time they were not disposed to accept the proposition that a transferee of coparceners could not avoid a sale by the manager otherwise than for legal necessity. As the point was not determined, it is no authority for holding the contrary, but it does justify the argument that at any rate in that case their Lordships, though asked to accept the view that the transferees could not avoid, refused to do so.

There remains a decision of a two-Judge Bench of this Court which has been strongly relied upon by the appellants in support of their contention that the transferees of the coparceners cannot exercise the right of avoidance. It is *Durga Prasad v. Bhajan* (1), decided by PRAMADA CHARAN BANERJI, J., and WALLACH, J.

(1) (1919) I. L. R., 42 All., 50.

An examination, however, of this decision shows that it in no way helps the appellants and has no bearing on the present question. In that case the father of a joint Hindu family with two sons mortgaged some of the joint family property. Subsequently a later managing member of the family, as it existed at a later date, sold the mortgaged property, and the purchasers of it brought a suit for redemption of the mortgage. The suit was resisted by the mortgagee on the ground that the later sale of the property was not for legal necessity, and it was held that this plea was not open to the mortgagee. Now it is obvious that what the mortgagee acquired at the time of the mortgage was only the rights of a mortgagee, and that he could not thereby acquire the interest of the coparceners to avoid a subsequent sale. The mortgagee was therefore never the successor in interest of the coparceners in respect of the right to avoid. The decision would appear to be correct and consistent with the view expressed by CHAMIER, J., in the *obiter dictum* in the case of *Muhammad Muzamil-Ullah Khan*, discussed above. For the mortgagee was attempting to use avoidance of the later transfer for the purpose of resisting redemption of his mortgage and not merely for the protection or definition of his mortgage. At any rate this decision is no authority for anything more than that it is not everybody whose interest it might be to get a transfer effected by a manager declared invalid who can challenge that transfer, but only persons who have acquired property from the coparceners carrying with it a right of avoidance.

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It is, therefore, clear that there is a consensus of authority that a transferee of the interest of the coparceners may call in question a transfer made by the manager even after the coparceners themselves have ceased to have any interest in the property. Apart from this, there is



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a consideration which appears to us decisive for holding that this is so. If the transferees of the coparceners could not exercise the powers of the coparceners to avoid a transfer, then this fact would operate adversely to the coparceners in disposing of their interest in the property. This being so, the improper sale by a manager otherwise than for legal necessity would operate to the disadvantage of the coparceners unless they previous to the alienation of their interest, took steps to avoid the transfer by the manager. It does not appear equitable that the unlawful action of the manager should put the coparceners to this trouble and expense. We take it as settled law that the coparceners can avoid an improper transfer by the manager otherwise than by bringing a suit. They can merely refuse to be bound by it. The only ground that appears to us to exist for refusing to the transferees of the coparceners the right to avoid is that in cases where the coparceners sell property previously mortgaged by the manager or subject to that mortgage it would seem inequitable that the transferees, having paid a smaller price for the property by reason of the existence of the mortgage, should be able to deny the validity of the mortgage. This result, however, is avoided by holding, as suggested above, that a transferee from a coparcenary body can only invoke a power to avoid a previous alienation by a manager when it is necessary for the protection or definition of the property or right acquired by his transfer. In the case of a voluntary transfer by deed the coparceners define the property or right transferred; there is no occasion for further definition; and the transferee is bound by the definition of the coparceners.

We would summarize our view of the law as based on the above decisions on this subject as follows. A transferee of any property or interest in property from a coparcenary body acquires along with that property

or interest the right of the coparcenary body to call in question a previous alienation made by the manager of the family, otherwise than for legal necessity, for the purpose of protecting or defining the property or interest acquired. Certain results follow from this definition. Such transferee cannot call in question a subsequent alienation, since at the time of the acquisition to which the right attaches there was *ex hypothesi* no alienation to avoid. The power cannot be used by a mortgagee to resist a suit for redemption by a subsequent alienee of the equity of redemption, since this would be using it for a purpose beyond protection of the mortgagee's interest. Nor can it be used by the transferee of a mere equity of redemption under a voluntary deed of transfer; for in this case the deed would have sufficiently defined the interest acquired. A purchaser, however, at a court sale in execution of a decree for sale of property subject to a mortgage can use the power to impugn the mortgage unless the validity of the mortgage has been decided by the court as against the mortgagor, i.e. the coparcenary body; because the purchaser purchases at the risk of getting something worse and also on the chance of getting something better than stated as sold in the proclamation of sale; "*caveat emptor, gaudeat emptor.*"

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The power of avoidance in the hands of the transferee cannot be greater than that which would have been exercised by the coparcenary body at the moment immediately preceding the transfer. Hence if the coparcenary body at that moment were a father and sons, and the manager the father, the transferee would be bound by the sons' obligation to pay a father's antecedent debt. Hence, again, if the coparceners had affirmed the previous alienation, the transferee would be bound by the un rebuttable presumption that the alienation was for legal necessity.



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Now in this suit the defendant respondent Gajendrapal Singh and his co-transferees (defendants) relied on two transfers in their favour. One was the second mortgage executed in their favour by the mortgagors coparceners; and one was the court sale of the property in pursuance of their second mortgage but subject to the appellants' first mortgage. The deed of second mortgage is not before us but we understand that it contained no mention of the first mortgage. If it had, the interest of Gajendrapal Singh, etc., would have been sufficiently defined by that mortgage-deed, and they could not have impugned the validity of the first mortgage. Assuming, however, as we must in the absence of evidence before us, that it did not, the question arises whether as second mortgagees they were entitled to impugn the validity of the first mortgage. On the conclusions reached above they would be. For, by not expressing the second mortgage as being subject to the first, the mortgagors coparceners must either be held to have called in question the first mortgage or at any rate to have made it necessary for the second mortgagees to call it in question in order to define their interest. Their interest as second mortgagees has now merged in their interest as purchasers by court sale (in execution of their decree as second mortgagees) of the property subject to the first mortgage. This being so, it is unnecessary for them to claim to avoid as second mortgagees (possibly they might keep their mortgage alive for this purpose), as they can claim to avoid as successors in interest to the mortgagors coparceners of the right to avoid.

[The judgement then proceeded to consider whether Gajendrapal Singh and others were estopped from challenging the first mortgage by reason of a certain compromise arrived at in a previous suit, and held they were not estopped.]

Consequently we hold that Gajendrapal Singh, etc., as transferees from the mortgagors coparceners, are entitled to call the mortgage in suit in question, and on the findings of fact that mortgage must be deemed void. The present appeal is also unmaintainable against Gajendrapal Singh alone, and we see no reason for allowing any other of the defendants to be joined as respondents at this stage. The appeal, therefore, fails and is dismissed with costs.

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*Before Mr. Justice Sen and Mr. Justice Niamat-ullah.*

RAM AUTAR AND OTHERS (DEFENDANTS) v. GHULAM DASTGIR AND OTHERS (PLAINTIFFS).\*

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*Co-obligees—Heirs of a usufructuary mortgagee—Muham-  
madan law—Payment to and discharge by one of the heirs  
—Powers of a de facto guardian—A'kar.*

Where, upon the death of a usufructuary mortgagee, his estate devolves upon a number of heirs under the Muhammadan law, each of such heirs has a distinct and defined interest in the mortgaged property, and payment to one of the heirs without the concurrence of the rest cannot operate as a valid discharge of the mortgage debt.

Under the Muhammadan law a *de facto* guardian of a minor, (e.g. an elder brother who has taken upon himself the management of the property inherited by himself and his minor brother from their father), has no authority to deal with the minor's interest in immovable property, which is technically described as *a'kar*, and cannot therefore give a valid discharge or release of the minor's interest in the property which had been held by the father as usufructuary mortgagee.

THE facts of the case sufficiently appear from the judgement of the Court.

Munshi Haribans Sahai, for the appellants.

Maulvi S. Majid Ali, for the respondents.

\* Second Appeal No. 158 of 1926 from a decree of Manmohan Sanyal, Additional Subordinate Judge of Jaunpur, dated the 12th of October, 1925, reversing a decree of J. C. Mallik, Munsif of Jaunpur, dated the 2nd of January, 1925.

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SEN and NIAMAT-ULLAH, JJ. :—This is an appeal by the defendants in a suit for possession of a 6 anna 1 pie share out of 16 annas in certain immoveable property mortgaged by Darshan Kurmi, ancestor of the defendants appellants in favour of Sheikh Mohammad Jan, ancestor of the plaintiffs and the *pro forma* defendants Nos. 10 to 18. The plaintiffs claimed Rs. 351 by way of mesne profits. Alternatively, they claimed a decree for recovery of Rs. 689-7-0, being their share in the mortgage money according to the account set out at the foot of the plaint. The mortgage in suit was a usufructuary mortgage made on the 12th of December, 1888, to secure a sum of Rs. 898. The mortgagee died about the year 1904 leaving three sons, five daughters and two widows. Sheikh Ghulam Mohiuddin, a step-brother of the plaintiffs Nos. 1 to 3, managed the estate for himself and the other members of the family between the years 1904 and 1921. On the 20th of May, 1919, Sheikh Ghulam Mohiuddin received the entire mortgage money from the defendants Nos. 1 to 9 and released the property in their favour. This was at a time when admittedly Ghulam Dastgir, the plaintiff No. 1, was a minor.

The plaintiffs allege that Sheikh Ghulam Mohiuddin was not competent to release the mortgaged property during the minority of Ghulam Dastgir at a time when he was not capable of giving his concurrence to the release and that they are not bound by the transaction, dated the 20th of May, 1919.

The defendants contended *inter alia* that Sheikh Ghulam Mohiuddin was the manager of the family consisting of the plaintiffs and of the other defendants who have been arrayed as *pro forma* defendants, that he was competent to discharge the mortgage debt and that the plaintiffs were bound by the release granted by him. This contention was sustained by the court of first instance

which dismissed the plaintiffs' suit. The lower appellate court concurred with the finding of the trial court that Sheikh Ghulam Mohiuddin was the manager, *kar-pardaz* and guardian of the minor plaintiff between the years 1904 and 1921, but it held that under the Muhammadan law it was beyond the competence of Sheikh Ghulam Mohiuddin to release the mortgaged property during the minority of one of the plaintiffs. It is contended before us that the court below has erred in arriving at this conclusion. We have considered the question in all its aspects and have not the slightest doubt in holding that the decision of the court below is right. Where, upon the death of a usufructuary mortgagee, his estate devolves upon a number of heirs under the Muhammadan law, each of such heirs has a distinct and defined interest in the mortgaged property; and payment to one of the heirs without the concurrence of the rest cannot operate as a valid discharge of the mortgage debt. The several heirs of Muhammad Jan upon whom the inheritance devolved must be considered as a single unit. TINDAL, C. J., observed as follows in *Decharms v. Harwood* (1): "The authorities all agree that whatever be the number of parceners, they all constitute one heir. They are connected together by unity of interest and unity of title." Where the mortgagee rights have devolved upon a number of persons by inheritance under the Muhammadan law, the various co-heirs are interested in the property according to their *Quaranic* shares and constitute tenants-in-common. In *Manzur Ali v. Mahmud-un-nissa* (2), it was held by STANLEY, C. J., and BANERJI, J., that where the obligees are tenants-in-common, the discharge by one of the obligees cannot be set up as a defence against the other obligee or obligees suing for his or their shares of the debt. A similar view was taken by a Bench of

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(1) (1874) 10 Bing's Reports, 526, (2) (1902) I. L. R., 25 All., 155.  
at 529.

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the Bombay High Court in *Sitaram Apaji v. Shridhar Anant* (1) and it was held that where property was mortgaged to one person, who subsequently died leaving a number of heirs jointly entitled to the estate, payment made by the mortgagor of the entire amount due upon the mortgage to only one of the heirs without the concurrence of the others did not amount to a valid discharge to the mortgagor. The same view was taken by this Court in *Ram Chandra v. Goswami Rajjan Lal* (2).

It ought to be remembered that Ghulam Mohiuddin was not the legal guardian of the plaintiffs Nos. 1 to 3 under the Muhammadan law. Where a brother, who has no derivative authority from the legal guardian, i.e., from either the father or the paternal grandfather of the minor, assumes the management and control of the minor's property, he cannot impose any obligations upon the minor excepting such as afford protection to the minor's estate. Ghulam Mohiuddin was only a *de facto* guardian, and in arrogating to himself the management of the minor's property he was no more than a *fazuli*. The powers of a guardian under the Muhammadan law to deal with the property of the minor are extremely limited, and his authority to treat the immoveable property of the minor, which is technically described as *a'kar*, is more restricted still. It is not necessary for us to decide whether a person in the position of Ghulam Mohiuddin was or was not competent to discharge a simple debt in which he was jointly interested with the minor. But where the debt is secured by usufructuary mortgage of immoveable property which was in possession of the minor and himself, it was clearly beyond the range of his authority to release this property at a time when the minor was not competent to signify his assent to the transaction. The nature of the powers possessed by the *de facto* guardian to deal with the minor's property has been discussed by the Judicial Committee in

(1) (1903) I. L. R., 27 Bom., 292. (2) (1909) I. L. R., 32 All., 164.

*Imambandi v. Mutsaddi* (1). At page 894 their Lordships observed: "Whilst an executor-guardian (*wasi*) may 'sell or purchase moveables on account of the orphan under his charge either for an equivalent or at such a rate as to occasion an inconsiderable loss', dealings with his immoveable property are subjected to strict conditions.

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. . . In fact, the Mussulman law appears to draw a sharp distinction between moveable and immoveable property (*a'kar*) in respect of the powers of guardians, as will be seen from the following passage in Baillie's Digest, page 689:—"With regard to the executor of a mother or brother,—when a mother has died leaving property and a minor son, and having appointed an executor, or a brother has died leaving property and a minor brother, and having appointed an executor, the executor may lawfully sell anything but *a'kar* belonging to the estate of the deceased, but can neither sell the *a'kar*, nor lawfully buy anything for the minor but food and clothing, which are necessary for his preservation," "We are of opinion that Ghulam Mohiuddin was not competent to release the minor's interest in the mortgaged property which constituted *a'kar* under the Muhammadan law.

An exception has been taken to the fact that the question of the plaintiffs' share in the estate of Mohammad Jan has not been determined by either of the courts below. This objection is well founded; but we have worked out the shares of the plaintiffs, who can under no circumstances be entitled to less than a 6 anna 1 pie share in the estate of Mohammad Jan as claimed by them. If the defendants Nos. 1 to 9 have any grievance they can proceed against Ghulam Mohiuddin. They made the payment to an unauthorised person and they cannot ask this Court to pass a decree not as against them but as against Ghulam Mohiuddin.

We dismiss this appeal with costs.

(1) (1918) I. L. R., 45 Cal., 878.



Before Mr. Justice Sulaiman and Mr. Justice Kendall.

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January,  
18.

LALTA PRASAD (PLAINTIFF) *v.* CHUNNI SINGH AND  
ANOTHER (DEFENDANTS).\*

Act (Local) No. XI of 1922 (Agra Pre-emption Act), section 12—Pre-emption—Holders of specific plots of muafi lands—Wajib-ul-arz recording custom of pre-emption but negating right of holders of muafi lands.

When a right of pre-emption is recorded in a *wajib-ul-arz* of the mahal, the question as to what persons are entitled to exercise the right is to be determined by reference to section 12 of the Act and not to the recitals in the *wajib-ul-arz*. Where a *wajib-ul-arz*, framed before the Agra Pre-emption Act, recorded a custom of pre-emption but there was a recital in it to the effect that holders of resumed *muafi* lands were not co-sharers and not entitled to pre-empt, it was held that such persons were entitled, under section 12 of the Act, to pre-empt a sale of resumed *muafi* land in which they were coparceners.

THE facts of the case sufficiently appear from the judgement of the Court.

Babu Piary Lal Banerji and Munshi Sarkar Bahadur Johari, for the appellant.

Munshi Narain Prasad Asthana (for whom Munshi Shiva Prasad Sinha), for the respondents.

SULAIMAN and KENDALL, JJ. :—In this case part of the resumed *muafi* land comprised in one *khewat* and assessed to Government revenue has been sold. The plaintiff is a co-sharer in this very *khewat*. An earlier *wajib-ul-arz* prepared for the village records a custom of pre-emption, but there is also a recital in it to the effect that the co-sharers of the village have no concern with the resumed *muafi*. The defendants are strangers. The court of first instance decreed the claim for pre-

\* Second Appeal No. 1642 of 1926, from a decree of E. T. Thurston, District Judge of Budaun, dated the 14th of August, 1926, reversing a decree of Sheobaran Singh, Munsif of Bisauli, dated the 27th of April, 1926.

emption, but on appeal the District Judge has dismissed it, holding that having regard to the recital in the *wajib-ul-arz* there is no right of pre-emption in *muafi* lands. We are unable to concur in this view. When a right of pre-emption is recorded in a *wajib-ul-arz* of the mahal, a right must be deemed to exist in view of the provisions of section 5 of the Act. The question as to what persons are entitled to exercise this right is to be determined by reference to section 12 of the Act and not to the recitals in the *wajib-ul-arz*. Under the last-mentioned section when a petty proprietary interest is sold, coparceners in that interest have the first right of pre-emption. The holders of these resumed *muafis* are holders of specific plots in the mahal and are obviously not entitled to take part in the administration of its affairs and do not own any land in the mahal jointly with the co-sharers. They are accordingly petty proprietors within the meaning of section 4, sub-clause (7). The plaintiff therefore has the first right of pre-emption. We accordingly allow this appeal and setting aside the decree of the lower appellate court restore that of the first court with costs in all courts.

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*Before Mr. Justice Banerji and Mr. Justice King.*

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MUSTAFA-UN-NISSA BIBI (PLAINTIFF).\*

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Act No. IV of 1882 (*Transfer of Property Act*), section 53—  
*Fraudulent transfer—Principle applicable to transfer under a fraudulent and collusive decree on award.*

The principles embodied in section 53 of the Transfer of Property Act are in accordance with the general principles of justice, equity and good conscience and as such should be taken as a guide by the courts even in cases where the provisions of section 53 do not in terms apply, e.g. because the

\* First Appeal No. 78 of 1926, from a decree of Girish Prasad Mathur, Additional Subordinate Judge of Budaun, dated the 18th of November, 1925.



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transfer is by virtue of a decree on an award. Where, ostensibly, a dispute between a Muhammadan husband and wife regarding dower was referred to arbitration, and the husband transferred his property to the wife in accordance with the decree passed on the award, but the circumstances showed that there was no real dispute regarding the dower, and the appointment of an arbitrator was a mere trick for the purpose of obtaining a colourable award and a decree upon which to base the collusive and nominal transfer, with the object of saving the property from the impending claim of certain creditors, it was held that the principle of section 53 was applicable and the transfer was voidable by the creditors. *Champo v. Shankar Das* (1), *Ibrahim v. Jivan Das* (2) and *Bhagwant Appaji v. Kedari Kasinath* (3), referred to.

THE facts of the case are fully stated in the judgment of the Court.

Maulvi Iqbal Ahmad and Mr. Akhtar Husain Khan, for the appellants.

Hafiz Mushtaq Ahmad, for the respondent.

BANERJI and KING, JJ. :—This appeal arises out of a suit for a declaration that certain zamindari property and a house belonged to the plaintiff, Musammat Mustafa-un-nissa, and are not liable to attachment and sale in execution of a decree obtained by the contesting defendants against Shaukat Ali, the plaintiff's husband.

Shaukat Ali had two wives, namely, Qutub-un-nissa, the first wife, and Mustafa-un-nissa, the plaintiff, the second wife, Shaukat Ali had practically no property of his own and was maintained by his father, Qudrat Ali. On the 15th of April, 1924, Qudrat Ali died and the bulk of his property passed to Shaukat Ali by inheritance. The first wife, Qutub-un-nissa, had died some time before Shaukat Ali inherited the property, and soon after Qudrat Ali's death the heirs of Musammat Qutub-un-nissa demanded her dower debt from

(1) (1912) 14 Indian Cases, 232. (2) [1924] A. I. R., (Lab.), 707.  
(3) (1900) I. L. R., 25 Bom., 202.

Shaukat Ali. They filed a suit on the 3rd of July, 1924, claiming Rs. 23,000 as the dower debt and obtained a decree against Shaukat Ali for Rs. 18,750 on the 17th of September, 1924. The decree-holders sought to attach the property in suit in execution of their decree but were resisted by the plaintiff, who claimed that the property had been transferred to her by a decree dated the 8th of July, 1924, which had been passed on the basis of an award in lieu of her dower debt. The decree-holders maintained that the transfer of the property by Shaukat Ali to Musammat Mustafa-un-nissa was a colourable transaction. The execution court gave effect to their contention and dismissed the plaintiff's objection. Hence the present suit for the establishment of the plaintiff's title to the property in dispute.

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The plaintiff's case was that her dower was fixed at Rs. 51,000 at the time of her marriage, about 27 years before the suit. Soon after Qudrat Ali's death she demanded her prompt dower from her husband and the matter was referred to an arbitrator who delivered an award on the 28th of May, 1924, deciding that Rs. 17,000 of the dower was prompt dower and that the plaintiff should be owner of the property in suit in lieu of her claim for dower. Mutation was effected in the plaintiff's name and she claims to have been in proprietary possession. The defence was that the amount of dower was much less than Rs. 51,000 and that the award and decree upon which the plaintiff bases her title are collusive and fraudulent and were obtained with a view to defeat the defendants' claim for the dower debt of the deceased wife, Qutub-un-nissa.

The trial court found that the plaintiff's dower was Rs. 51,000 and held that there was a real transfer of the property in suit in accordance with the decree passed on the basis of the award. The court took the view that

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Shaukat Ali was merely preferring one creditor to another and that the transfer was not vitiated by collusion or fraud. The trial court accordingly decreed the plaintiff's suit.

The first question for our determination is whether the plaintiff's dower was fixed at Rs. 51,000 as alleged.

[The judgement then discussed the evidence and continued.]

We decide this point in the plaintiff's favour.

The next question is whether the award and decree passed upon its basis are vitiated by fraud and collusion with a view to defeating the claims of the heirs of Qutub-un-nissa. On this point we are unable to agree with the view of the trial court. The provisions of section 53 of the Transfer of Property Act do not in terms apply to this case since the plaintiff bases her title on a transfer by a decree of a court and under section 2 (d) of the Transfer of Property Act such a transfer is not affected by the provisions of section 53. It has been frequently held, however, that the principles embodied in section 53 of the Transfer of Property Act are in accordance with the general principles of justice, equity and good conscience and as such should be taken as a guide by the courts even in cases where the provisions of section 53 do not apply. These principles have, for instance, been held to be of general application and have been applied in the Punjab where the Transfer of Property Act itself is not in force: *Champo v. Shankar Das* (1) and *Ibrahim v. Jivan Das* (2). The same view was also taken by the Bombay High Court in *Bhagwant Appaji v. Kedari Kashinath* (3). If we come to the conclusion, therefore, that the decree upon which the plaintiff bases her title is fraudulent and intended to defeat creditors the plaintiff cannot succeed.

(1) (1912) 14 Indian Cases, 232. (2) (1924) A. I. R., (Lah.), 707.  
(3) (1900) I. L. R., 25 Bom., 202 (209).

There are several indications of fraud and collusion in this case.

In the first place it is not shown that there was any dispute between the husband and wife which led to the appointment of an arbitrator for deciding the dispute. The husband and wife had lived together, apparently in perfect amity, for about 27 years and there is nothing to show why the wife should suddenly demand her prompt dower. Moreover, it is admitted that there was no dispute, either regarding the amount of dower or regarding the property which should be awarded to the plaintiff in lieu of dower, in the proceedings before the arbitrator. The husband admitted all along that the dower was Rs. 51,000 and made no objection to the transfer of the property which he had inherited, in lieu of his wife's claim.

The arbitrator himself was summoned as a witness by the plaintiff and was present in court, but was not produced for examination. This suggests that the plaintiff was afraid of producing him lest the true nature of the collusive proceedings should come to light. The plaintiff has not even produced a copy of the agreement to submit the alleged dispute to arbitration. Moreover, the plaintiff herself did not venture into the witness box. We draw an adverse inference from her reluctance to face cross-examination.

Another significant point is that the transferor and transferee stood in the relation of husband and wife and this fact of itself tends to throw some suspicion upon the proceedings.

Another important point is that the husband retained to himself the benefit of the property transferred. It is expressly laid down in the decree that the husband should have the right of residence in the dwelling house and there is a very important provision that the wife

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should have no power to transfer the property during the lifetime of her husband without his consent. The trial court remarks that it was a matter between husband and wife, so the husband was justified in imposing restrictions, but in our view these provisions show that the husband was careful to protect his own interests in the property and that he never intended to surrender the beneficial ownership.

We note the fact that the husband had mutation effected in his wife's name although the wife did not apply for execution of the decree. This shows that everything was done with the husband's consent.

Moreover, it is shown that the husband actually remained in possession of the zamindari property by realizing rent. The husband's position is clearly shown by the lease dated the 10th of July, 1924, by which the husband and wife jointly leased the property for a period of 20 years to one Niaz Ali upon receipt of Rs. 1,000 as premium together with a covenant for annual rent. The lessee was evidently not willing to accept a lease from the wife alone although she was the nominal owner. The lease recites that the wife is the owner in possession but, as the husband realizes rents and is also the lambardar, and as under the award the husband has a right to remain in possession during his lifetime along with the wife, therefore, the lessee desires that both husband and wife should join in executing the lease. The respondent contends that under the decree the husband was only entitled to possession of the *house*, but the fact remains that in the lease he is spoken of as entitled to remain in possession of the zamindari property also, and we have no doubt that this was in accordance with the reality. To all intents and purposes, therefore, the husband remained in possession and enjoyment of the property which he purported to have transferred to his wife.

it is worth noting that after the defendants obtained their decree in the dower suit the lessee considered his position to be precarious and gave up his lease upon recovering the premium of a thousand rupees which he had paid. This money was paid by the husband and the lessee certified in his petition of compromise dated the 18th of November, 1924, that nothing was due from Shaukat Ali. This clearly shows that the lessee at least regarded Shaukat Ali as the real lessor.

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Another indication of fraud and collusion is that under the decree the *whole* of the property inherited by the husband was transferred to the wife, the husband retaining nothing for himself. It is most unlikely that the husband would have meekly consented to such an arrangement in the absence of collusion.

There is a passage in Dr. Gour's Commentary on the Law of Transfer, 5th edition, vol. I, page 631, which is very applicable to the facts of the present case. The learned commentator remarks: "Indeed it is too well known that *benami* or fraudulent transfers are only too often made by Muhammadan debtors in favour of their spouses ostensibly in consideration of *mehar* but really with the object of withholding the property from their creditors. In such cases it would be pertinent to inquire as to what were the circumstances of the husband when the *mehar* was fixed; what was its nature, and if prompt, why it had remained unpaid and what circumstances had precipitated the transfer and how was it effectually carried out. Nor should it be forgotten that a debtor having many debts to pay can rightly place his property beyond the reach of his creditors by alienating to his wife and it cannot therefore be free from the taint of suspicion, which is all the more enhanced if after the transfer he is shown to have continued in its possession and to have participated in its benefit."



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In the present case, as we have shown, there are many circumstances throwing suspicion upon the *bona fides* of the award and decree in the plaintiff's favour. In our opinion there was no dispute between husband and wife regarding the dower, and the appointment of an arbitrator was a mere trick for the purpose of obtaining a colourable award and a decree upon its basis. The object of these fictitious proceedings was to save the property from the impending claim from the heirs of Musamat Qutub-un-nissa, and the husband and wife colluded so as to pass a nominal title to the wife, while the husband remained in possession and enjoyment of the property. On these findings the nominal transfer will not save the property from attachment and sale in execution of the defendants' decree.

There is one small point remaining for determination. The plaintiff claimed a decree that 14 out of 20 *sihams* of a house was not liable to attachment and sale. The defendants admitted that Shaukat Ali had a one-third share in this house and a one-third share had been attached in execution of their decree. They denied that the plaintiff was entitled to any larger share, such as 14 out of 24, which she claimed. The plaintiff did not produce any evidence to prove that she was entitled to anything more than the one-third share which had been admitted. Moreover she had no cause of action in respect of more than the one-third share which had been attached. So upon any view of the case she was not entitled to any declaration in respect of more than one-third share in the house and we hold that the court below was wrong in decreeing the whole claim in respect of the house.

In accordance with our findings above we allow the appeal and dismiss the plaintiff's suit with costs throughout.

## MISCELLANEOUS CRIMINAL.

*Before Mr. Justice Dalal.*

EMPEROR *v.* FATEH SINGH.\*

*Criminal Procedure Code, section 498—Bail—Cross-cases—* 1929  
January, 22.  
*One party already on bail.*

Where members of two parties were being prosecuted and one of them was released on bail, and the other party applied for bail for the purpose of instructing counsel, as otherwise the opposite party would have a better chance of presenting their case before the court :

*Held* that the reasons alleged must weigh with a court, and if there was no danger of the applicant absconding if released on bail, he should be released.

Babu *Saila Nath Mukerji* and *Munshi Girdhari Lal Agarwala*, for the applicant.

The Crown was not represented.

DALAL, J. :—This is an application for bail of one Fateh Singh, against whom an investigation is being made by the police on a charge under section 304 of the Indian Penal Code, punishable with transportation for life. The Magistrate, guided as he was by the provisions of section 497 of the Criminal Procedure Code, expressed his inability to grant bail in such a case as there appeared to be reasonable grounds for believing that Fateh Singh was guilty. The Sessions Judge, however, had wide powers under section 498 of the Criminal Procedure Code and has not considered the petition of appeal with care. It is represented that Fateh Singh is required to instruct his counsel, that members of two parties are being prosecuted, and that a member of the other party is released on bail and that, therefore, the other party will have a better chance of their case being properly represented in court.

\* Criminal Miscellaneous No. 33 of 1929.



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It is true that against the other party there is no charge under section 304 of the Indian Penal Code. At the same time these reasons must weigh with a court, and if there is no danger of the applicant Fateh Singh absconding if released on bail, I think that he should be so released. It was necessary for the Sessions Judge to consider all these points under section 498 of the Criminal Procedure Code.

The trying Magistrate is directed to release Fateh Singh on bail if he is satisfied that there is no apprehension of his absconding on proper sureties being ordered and secured. The trying Magistrate will please fix a bond and security accordingly if, in his opinion, such a bond and security will be sufficient to prevent Fateh Singh from absconding.

#### APPELLATE CIVIL.

*Before Mr. Justice Sulaiman and Mr. Justice Kendall.*

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January, 23.

ZALIM SINGH AND ANOTHER (DEFENDANTS) *v.* RAGHUNANDAN AND OTHERS (PLAINTIFFS AND DEFENDANTS).\*

*Act (Local) No. XI of 1922 (Agra Pre-emption Act), sections 3 and 5—Custom of pre-emption recorded in two out of three mahals formed by partition of a village—Presumption.*

A village was divided into three mahals; a custom of pre-emption was recorded in two mahals and in the third mahal, in which the vended property was situated, the *wajib-ul-arz* did not record any custom of pre-emption and simply stated that it was owned by a single proprietor. *Held*, in the absence of any *wajib-ul-arz* of the village prior to partition, it could not be presumed that the *wajib-ul-arz* of the parent mahal must have recorded a similar right.

\*Second Appeal No. 1784 of 1926, from a decree of Syed Ziaul Hasan, Additional Judge of Cawnpore, dated the 29th of June, 1926, reversing a decree of Sarup Narain, Second Additional Subordinate Judge of Cawnpore, dated the 30th of September, 1925.

Dr. Kailas Nath Katju and Munshi Shambhu Nath Seth, for the appellants.

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Babu Piary Lal Banerji and Pandit Rama Kant Malaviya, for the respondents.

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SULAIMAN and KENDALL, JJ.:—This is a defendants' appeal arising out of a suit for pre-emption. The first court dismissed the claim, but on appeal the lower appellate court has decreed it, holding that there is no right of pre-emption in the mahal in which the property is situated. There are three mahals in this village. *Wajib-ul-arzes* for all the three mahals have been produced and only two record a right of pre-emption, and the third mahal in which the property sold is situated does not record any right of pre-emption at all. It only states that it is owned by a single proprietor.

It is quite clear that the Act being applicable to the village in question, section 3 allows the right of pre-emption only in accordance with the provisions of this Act. Under section 5 a right of pre-emption is to be deemed to exist only in mahals or villages in respect of which any *wajib-ul-arz* prepared prior to the commencement of the Act records a custom, contract or declaration. No *wajib-ul-arz* prepared of the mahal in question records any such right. Thus there is no record of rights in respect of the area covered by this mahal which contains any such declaration. In our opinion the mere fact that there are *wajib-ul-arzes* for other mahals would not be sufficient to allow of a right of pre-emption in this mahal.

No earlier *wajib-ul-arz* of the village before there was a partition has been produced in this case. The lower appellate court thought that because the *wajib-ul-arzes* of the other two mahals recorded similar customs, the *wajib-ul-arz* of the parent mahal or village must also have recorded a similar right. In our opinion such a presumption is by no means justified inasmuch as it is quite pos-

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sible that the entry of such a right was made for the first time at the time of the partition when the three mahals were formed. In any case it was incumbent on the plaintiff to show that there was a *wajib-ul-arz* prepared prior to the commencement of this Act in respect of this particular mahal or village out of which it was formed which recorded such a custom or right. As the plaintiff failed to show that, the suit ought to have been dismissed.

We accordingly allow the appeal and setting aside the decree of the court below dismiss the plaintiff's suit with costs to the appellants.

*Before Mr. Justice Banerji and Mr. Justice King.*

1929  
January, 24.

NAUBAT LAL AND OTHERS (DEFENDANTS) v. MAHADEO PRASAD AND OTHERS (PLAINTIFFS).\*

*Act No. IX of 1908 (Indian Limitation Act), article 61—Auction purchase by mortgagee decree-holder—Sale set aside under order XXI, rule 89 by vendee of part of mortgaged property—Vendee's suit for possession or repayment—Transfer of Property Act (IV of 1882), section 56—Contribution.*

On the 11th of September, 1874, defendants' ancestors mortgaged 3 as. 1'33 pies in a village to one G, who on the 25th of June, 1919, purchased the property in execution of his decree. Plaintiffs, who were purchasers under simple money decrees of a 1 a. 7'33 pies share, deposited the decretal amount under order XXI, rule 89 of the Code of Civil Procedure and got the sale of the 25th of June, 1919 set aside. The plaintiffs then sued for possession of the property mortgaged in the deed of 1874 or in the alternative for the amount paid with interest from the date of payment. *Held* that the plaintiffs' suit was not time-barred and that article 61 of the Indian Limitation Act did not apply; and that the property in the hands of the parties must contribute rateably to G's decree.

\*First Appeal No. 76 of 1926, from a decree of Madan Mohan Seth, Additional Subordinate Judge of Gorakhpur, dated the 22nd of December, 1925.

The provisions of section 56 of the Transfer of Property Act do not apply to the case of a sale by auction.

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Held further that until the sale is confirmed the interest of the judgement-debtor is not transferred to the auction purchaser, and where in a case that interest is not transferred, it cannot be said that the right of redemption has come to an end. *Shah Mehdi Hasan v. Ismail Hasan* (1), distinguished. *Bisheshur Dial v. Ram Sarup* (2), followed.

Babu Peary Lal Banerji and Munshi Haribans Sahai, for the appellants.

Maulvi Iqbal Ahmad and Munshi Harnandan Prasad, for the respondents.

BANERJI and KING, JJ. :—This is a defendants' appeal under the following circumstances :—

The suit was for possession of certain zamindari property or in the alternative for recovery of a sum of Rs. 8,548-0-6 against a number of persons. The plaintiffs alleged that on the 11th of September, 1874, the ancestors of defendants Nos. 1 to 9, who are appellants before us, mortgaged 3 as. 1'33 pies in the village Chandpur to one Gokul Prasad. Gokul Prasad obtained a decree on foot of this mortgage and an auction sale in execution of that decree took place on the 25th of June, 1919, when Gokul Prasad bought the property mortgaged. The plaintiffs, who were purchasers under money decrees and mortgage decrees of 1 a. 7'33 pies in the village, deposited the whole of the decretal amount which was Rs. 4,519-12-4 on the 17th of July, 1919, under order XXI, rule 89 of the Code of Civil Procedure, and got the sale of the 25th of June, 1919, set aside. They in the present suit claim possession over the property which is not in their possession and was hypothecated in the deed of the 11th of September, 1874, or the amount of money paid thereon together with interest at 12 per cent. from

(1) (1920) I.L.R., 42 All., 517 (518). (2) (1900) I.L.R., 22 All., 284 (289).

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the date of payment. Defendants Nos. 1 to 9 pleaded that the plaintiffs' suit was barred by limitation and that the plaintiffs knew of the prior charge and hence they were liable to pay the same and the defendants were not bound to pay it. They also pleaded that the interest was excessive. The learned Subordinate Judge repelled the contention that the claim was barred by limitation and held that as the defendants Nos. 1 to 9 were heirs of the original mortgagors, they could not raise the question of rateable contribution, and granted a decree to the plaintiffs for the amount deposited together with interest at 6 per cent., holding that that sum was a charge on the property in the hands of the defendants.

The defendants have come in appeal in this Court and it is contended by the learned advocate for the appellants that the plaintiffs' claim was barred by article 61 of the Limitation Act, and that the property in the hands of the appellants was liable rateably to the claim of the plaintiffs.

With regard to the first point, the case for the defendants is that the payment made by the plaintiffs was not a payment made for redemption of any mortgage and that the mortgage subsisted only till the date of the actual sale of the property. The learned advocate contends that under the Transfer of Property Act, section 89, the right of redemption was barred on the passing of the final decree, but under order XXXIV, rule 5, the mortgage subsisted only till the date of the actual sale and that the sale having taken place before the date of payment made by the plaintiffs, such payment could not be treated as a redemption of the mortgage. In support of his argument, reference is made to a passage in the case of *Shah Mehdi Hasan v. Ismail Hasan*, (1):—"Under the present Code of Civil Procedure, which repeals section 89, the mere passing of a final decree does not extinguish the mort-

(1) (1920) I.L.R., 42 All., 517 (518).

gagor's right until a sale has actually taken place in pursuance of the decree." It must be stated that in that case the point raised was different and that as a matter of fact no sale had actually taken place on the material date. In the present case, no doubt, the auction sale had been held and the property had been purchased by the decree-holders. A reference to rule 92 of order XXI, shows that a sale cannot become absolute until it is confirmed by the court, and in fact when a deposit is made under rule 89 the court makes an order setting aside the sale. It is only when a sale has become absolute that the court grants a certificate specifying the property sold and that certificate bears the date on which the sale became absolute. We are of opinion that until the sale is confirmed it does not transfer the interest of the judgement-debtor to the auction-purchaser, and where in a case that interest is never transferred by the order of a court, it cannot be said that the right of redemption had come to an end. In fact the payment made in this case was made by a person who was owner of the property and interested in it as a purchaser of the equity of redemption. Rule 89 had not on the date of this sale been amended by the rule making powers of this Court to include the judgement-debtor and we cannot accept the contention that the payment made was not made by the mortgagor or his transferee, but as a judgement-debtor. We are, therefore, of opinion that the plaintiffs' claim is not barred by limitation and that article 61 of schedule II of the Limitation Act does not apply to the facts of the present case.

As regards the second point, we are of opinion that the contention of the learned advocate for the appellants must be accepted that the property in the hands of the plaintiffs and the defendants appellants must contribute rateably to the claim of Gokul Prasad. The learned advocate for the respondents has urged that in view of the provisions of section 81 of the Transfer of Property Act,

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his client being a subsequent mortgagee and purchaser under his decree was entitled to set up the plea that the property in the hands of defendants Nos. 1 to 9 was responsible for the payment of the claim of Gokul Prasad under a prior mortgage. One of the essential points for putting forward the above plea is that the subsequent encumbrancer does not know of the existence of the prior encumbrances and, as there are no materials on the record of the case, it is urged that an opportunity should be given to the plaintiffs to produce the original mortgage in his favour and to prove that he had no notice of the prior mortgage. We cannot permit fresh evidence to be adduced at this stage. It was for the plaintiffs to make out the case that is now attempted to be made out by their learned advocate in the plaint that he filed in the case. The plaint is so carelessly drawn up that the learned advocate himself cannot see how the plaintiffs were entitled to the first relief, nor can the defendants clearly set forward in their written statement the plea that the plaintiffs knew of the prior mortgage, and unless the original mortgage deed is laid before the court, no court can decide what was the contract entered into by the plaintiffs and the appellants when the mortgage in favour of the plaintiffs was executed.

Mr. *Iqbal Ahmad* further contends that under the principles underlying the provisions of section 56 of the Transfer of Property Act, he was entitled to plead that the appellants should pay up the whole of the mortgage of Gokul Prasad inasmuch as the plaintiffs were second mortgagees. The provisions of section 56 of the Transfer of Property Act can have no application to a case of an auction sale and in the absence of facts even the principles of that section cannot be applied to the present case. The property in the hands of the plaintiffs and the defendants appellants was liable to the extent of Rs. 4,519-12-4. In the case of *Bisheshwar Dyal v. Ram*

*Sarup* (1), it has been laid down that "When several parcels of property are mortgaged to secure one debt, every parcel is liable to the mortgagee for the whole amount of the debt; but as between themselves each parcel is liable, in the absence of a contract to the contrary, to contribute to the debt in the proportion which its value bears to the value of the whole property comprised in the mortgage . . . . The primary liability on each of several properties included in a mortgage being thus a proportionate share of the mortgage debt, every person who purchases one of those properties incurs a liability to that extent . . . . If any such purchaser has to discharge the whole of the mortgage debt, he is entitled to claim contribution from the owners of the remainder of the mortgaged property." We are, therefore, of opinion that the plaintiffs were only entitled to a proportionate share of the money that they paid to the prior mortgagee. It is not denied that the proportion in which the parties are in possession of the property mortgaged under the deed of the 11th of September, 1874, is that the plaintiffs are in possession of 19 and defendants in the possession of 17 pies each. The plaintiffs are therefore liable to that extent for the decree of Gokul Prasad and the defendants are liable in proportion. We modify the decree of the court below and declare that instead of the sum of Rs. 6,005 we substitute Rs. 2,835. Under order XXXIV, rule 4, a decree will be prepared for Rs. 2,835 with proportionate costs and with *pendente lite* and future interest at 6 per cent. per annum against the defendants appellants.

The parties will pay and receive costs in proportion to their success and failure in this Court and the court below. The office will fix a date six months from hence for payment.

(1) (1900) I. L. R., 22 All., 284 (289).

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Before Mr. Justice Sulaiman and Mr. Justice Kendall.

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(DEFENDANT).\*

*Act No. IV of 1882 (Transfer of Property Act), section 6(d) and (e)—Right to recover future maintenance—Transfer of personal allowance charged on immoveable property—Kharch-i-pandan.*

The question whether the right to recover future maintenance allowance is alienable or not depends not on whether a charge has been created for the same but on the true intention of the parties. If the intention was that the right should be restricted in its enjoyment to the owner personally, it cannot be transferred under section 6 (d) of the Transfer of Property Act. Nor can a mere right to sue for the remainder of allowance that may fall due in future be transferred under clause (e) of the section.

*Kharch-i-pandan* is a personal allowance, and, in the absence of any clear provision in the deed signed by the prospective husband, fixing the allowance in favour of his wife, that it was alienable, it could not be held so on the mere fact that the payment was secured by a charge on immovable property.

*Gulab Kunwar v. Bansidhar* (1), *Haridas Acharjia v. Baroda Kishore* (2), *Sher Singh v. Sri Ram* (3), *Ranee Annapurni v. Swaminatha* (4), *Khwaja Muhammad Khan v. Husaini Begam* (5) and *Harris v. Brown* (6), referred to; *Subraya Sampigethaya v. Krishna Baipadithaya* (7) and *Tara Sundari Debi v. Saroda Charan Banerjee* (8), followed.

Mr. A. M. Khwaja and Maulvi Mushtaq Ahmad, for the appellant.

Pandit Uma Shankar Bajpai, for the respondent.

SULAIMAN and KENDALL, JJ.:—This is a plaintiff's appeal arising out of a suit for cancellation of a sale-deed, dated the 2nd of September, 1921, executed by the

\*First Appeal No. 339 of 1925, from a decree of Gauri Prasad, Subordinate Judge of Pilibhit, dated the 23rd of May, 1925.

(1) (1893) I. L. R., 15 All., 371.

(2) (1899) I. L. R., 27 Cal., 38.

(3) (1908) I. L. R., 30 All., 246.

(4) (1910) I. L. R., 34 Mad., 7.

(5) (1910) I. L. R., 32 All., 410.

(6) (1901) I. L. R., 28 Cal., 621.

(7) (1923) I. L. R., 46 Mad., 659.

(8) (1910) 12 C. L. J., 146.

plaintiff in favour of the defendant, and in the alternative for recovery of the amount of the sale consideration. Under a hypothecation-bond, dated the 21st of September, 1913, the plaintiff's husband had undertaken to pay her a monthly allowance of Rs. 75 and had hypothecated his village Nagphan Risuya, valuing the deed at Rs. 10,800. There were certain misunderstandings between the husband and the wife, and it is an admitted fact that she could not for a long time recover her monthly allowance. Eventually she sued her husband for recovery of the arrears and in execution of her decree put the village to sale at auction. It was purchased by Hakim Zakir Husain Khan for a small amount, as the sale was apparently subject to the continuing charge. Thereafter she brought a second suit against her husband and the purchaser and obtained a decree on the 28th of February, 1920, for about Rs. 5,554. This decree also remained unrealized. On the 2nd of September, 1921, she executed the sale-deed in dispute in favour of the contesting defendant Brij Narain. The sale-deed as it stands purported to transfer the decretal amount aforementioned, the amount of her maintenance allowance which had fallen due since the decree and the future amounts which would fall due during the rest of her life with all rights to realize the same. The sale was for Rs. 7,500 which was to be paid in certain fixed instalments. There was a special covenant for forfeiture which we will discuss later on. The plaintiff's case was that she being a *pardanashin* and uneducated lady did not understand the terms of the deed thoroughly, which were not explained to her; that the defendant and her *pairokar* colluded with each other and falsely represented to her that only the arrears which had fallen due up to date were being transferred, and that she was never told that her future maintenance allowance for life would also be sold under the deed. She further asserted that there was an

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ERLU NARAIN. <sup>v.</sup> express understanding that if the defendant should make any default in the payment of any instalment, he would not be entitled to get back the amount received and the sale-deed would be cancelled, and that, accordingly, as there were defaults made the sale-deed has become void, and that it is invalid in law. These allegations were refuted in the written statement in which it was pleaded that the plaintiff executed the document after fully understanding its terms, that the penal clause was unenforceable and that it was never agreed that the sale itself would be cancelled.

The court below has decided most of the issues against the plaintiff, but upheld her right to claim a forfeiture of Rs. 1,500 and has given her a decree for the unpaid balance with interest. The plaintiff has appealed and the defendant has filed cross-objections.

The first question to be considered is whether the plaintiff did not understand that her future maintenance allowance was also going to be sold. Connected with this is the further question whether any misrepresentation was made to the plaintiff. The learned Subordinate Judge has disposed of both these points together and has considered that the burden of proving both these matters lay on the plaintiff. He began his findings on issues Nos. 1 and 2 with the remark "To prove these issues the plaintiff, besides giving her own statement, has examined such and such witnesses." He has then remarked "To my mind the plaintiff has miserably failed to establish either of the two assertions" and has again said that her explanation that her relations and servants failed to explain to her the real nature of the sale was absolutely unbelievable. The learned Subordinate Judge has apparently lost sight of the fact that although the burden of proving any active misrepresentation was on the plaintiff, the onus of satisfying the court that the deed had been fully explained to and understood by the lady was on the defendant,

because the plaintiff is undoubtedly a *pardanashin* and uneducated lady. In spite of this error in the judgement, we are of opinion that the finding of the court below that the contents of the sale-deed so far as it relates to the transfer of her future maintenance allowance were fully understood by her. [The judgement then referred to the evidence on this point.]

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The second point for consideration is whether it was covenanted that on failure of the payment of the instalments fixed in the deed the sale-deed would stand cancelled. [After discussing this question the Court came to the following conclusion.] We accordingly uphold the view of the court below, though on different grounds, that there was no covenant directing that the sale itself would stand cancelled if a default were made.

The third question is as regards the amount of which the plaintiff can claim forfeiture. This part of the clause also is ambiguously worded. According to the plaintiff the whole amount which would have been paid up to date would be forfeited if any default was made. According to the defendant only Rs. 1,500 which had been paid before the execution were to be forfeited. [The question was discussed and concluded as follows.] It is impossible to hold that this ambiguous clause was fully understood by the plaintiff in the way in which the defendant wants it to be interpreted. We would therefore be unable to enforce the deed without accepting the plaintiff's interpretation of it.

The argument on behalf of the defendant, that such a forfeiture clause cannot be enforced, cannot be accepted. The executant was a *pardanashin* and uneducated lady. If she is made to agree to sell her property on the understanding that a forfeiture clause will be operative in her favour and it is not explained to her that such a forfeiture was illegal and unenforceable, then if the defendant wishes to stick to the transaction he cannot be

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allowed to repudiate the forfeiture clause on the strength of which her consent had been obtained. Nor do we think that, having regard to the small consideration for which rights of considerable value were being transferred, and the necessity which the plaintiff felt for timely and regular payment being urgent, the terms of such a forfeiture clause were so improper and unreasonable as to demand relief in equity.

The last question to consider is whether a transfer of her future right to recover the maintenance allowance was legally valid. That there has been a considerable divergence of opinion on similar questions admits of no doubt. The counsel for the parties have placed before us a number of rulings, all of which are not reconcilable with each other.

So far as this Court is concerned it is now settled that a right to future maintenance cannot be attached and sold in execution of a decree—*Gulab Kunwar v. Bansidhar* (1), *Haridas Acharjia v. Baroda Kishore* (2), and *Sher Singh v. Sri Ram* (3). Although these cases may suggest the general policy of the legislature, they are not directly in point because they turn on the meaning of the expression “right to future maintenance” in section 266 of the old Civil Procedure Code.

The question before us is whether a private alienation of such a right is valid in law. This will depend mainly on the interpretation of section 6 (d) of the Transfer of Property Act. No case of our High Court which is directly in point has been cited before us. Opinions in the other High Courts are somewhat conflicting. In *Ranee Annapurni v. Swaminatha* (4), a Bench of the Madras High Court thought that a right to recover maintenance was not property within the meaning of section 6 and expressed the view that although attachment and

(1) (1893) I. L. R., 15 All., 371.

(2) (1899) I. L. R., 27 Cal., 38.

(3) (1908) I. L. R., 30 All., 246.

(4) (1910) I. L. R., 34 Mad., 7.

sale were prohibited, there was no prohibition against private alienation. This case was however subsequently overruled by a Full Bench of the same Court in *Subraya Sampigethaya v. Krishna Bai* <sup>1929</sup> *padithaya* (1). The Bench which referred the case to a higher Bench thought that *Ranee Annapurni's* case was at variance with section 6. SCHWABE, C. J., came to the conclusion that the right to be maintained conferred on a widow under a written document was a purely personal right and therefore clearly inalienable. OLDFIELD, J., differed from the view expressed in *Ranee Annapurni's* case and also held that the rights conferred by the deed were clearly personal. COUTTS TROTTER, J., concurred. This case is also authority for the view that in order to ascertain whether the right was personal or whether the interest was intended to be restricted in its enjoyment to the owner personally one should ascertain the intention of the parties, and such intention is to be gathered from the deed and the attending circumstances.

Opinion in Calcutta also has not been unanimous; but a most exhaustive judgement of MOOKERJEE, J., reviewing all the leading previous authorities is to be found in *Tara Sundari Debi v. Saroda Charan Banerjee* (2). We propose to quote a passage from the judgement as we agree with the view expressed therein. At page 153 the learned Judge remarked: "A distinction appears to have been sought to be drawn between cases in which the maintenance was made a charge upon a definite property or was made payable out of a specific fund, and cases in which the grantee of the right of maintenance was not so protected. This distinction, however, in our opinion, does not furnish a true solution of the question, whether the right is assignable or not, because, if the allowance is regularly paid by the person liable, no question of enforcement of a charge upon any interest in immovable

(1) (1923) I. L. R., 46 Mad., 659. (2) (1910) 12 C. L. J., 146.



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property arises; unless a default has been made, and arrears are due, there is no charge to enforce. The answer to the question, therefore, whether the right to receive the maintenance is assignable or not, ought not to be made dependant upon the circumstance whether, in the event of failure of the grantor or his representative to make regular payments, the grantee is entitled to enforce a charge upon immoveable property". At page 157 the learned Judge examined the circumstances attending the grant of the maintenance allowance in order to ascertain the true intention of the parties, and came to the conclusion that the right from every point of view was essentially a personal one and that there was no room for reasonable doubt that such right was not assignable.

We agree with the view expressed in the Full Bench of the Madras High Court and by MOOKERJEE, J., that the question whether the right to recover future maintenance allowance is alienable or not depends not on whether a charge has been created for the same but on the true intention of the parties. If the intention was that the right should be restricted in its enjoyment to the owner personally, it cannot be transferred under section 6 (d). Nor can a mere right to sue for the remainder of allowance that may fall due in future be transferred under clause (e).

There being no advance by way of loan, the agreement in question does not amount to a mortgage-deed. It is an agreement to pay the monthly allowance with a charge on a specific immoveable property. Now there is a clear distinction between a mortgage and a charge, the former being a *transfer* of an interest in immoveable property as a security for the loan, whereas the latter is *not* a transfer, though it is nonetheless a security for the payment of an amount. The right to recover such allowance is not itself immoveable property, and indeed

no question of enforcing the charge arises so long as the amount has not fallen into arrears.

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In this view of the matter we must now proceed to examine the true nature of the maintenance allowance. The agreement of the 21st of September, 1913, was executed in anticipation of the marriage of the plaintiff and the sum of Rs. 75 per mensem was fixed as an allowance for her *kharch-i-pandan*, which has been translated inaccurately as pin-money. The prospective husband agreed in writing to pay the allowance *to the lady for her life* and if he failed to pay it the lady was entitled to realize the same. The agreement was to hold good during the lifetime of the lady and the payment was secured by means of a charge on immoveable property. The deed nowhere mentions that the amount could be claimed by the lady's representatives. Of course as the allowance was to subsist during her lifetime only, her heirs could not get it, but there is not even a mention that her transferee can recover it. Nowhere is it mentioned that the right would be alienable. From the very nature of the allowance, which was intended to enable her to meet her daily expenses, it was a personal allowance. All doubt on this point is in our opinion set at rest by the observation of their Lordships of the Privy Council in the leading case of *Khwaja Muhammad Khan v. Husaini Begam* (1). There, too, there was an agreement to pay an allowance as *kharch-i-pandan* charged upon immoveable property. At page 414 their Lordships remarked: "*Kharch-i-pandan* which literally means betel-box expenses is a *personal allowance*, as *their Lordships understand*, to the wife customary among Muhammadan families of rank, especially in Upper India, fixed either before or after the marriage and varying according to the means and position of the parties . . . Although there is some analogy between this allowance and the pin-money in the English system, it appears to stand

(1) (1910) I. L. R., 32 All., 410.



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on a different legal footing arising from difference in social institutions." Although both *kharch-i-pandan* and pin-money were regarded by their Lordships as being amounts for the personal expenses of the wife, there was a difference inasmuch as no obligation to spend the money during coverture attached to the *kharch-i-pandan*. In the case of *Harris v. Brown* (1), which is relied upon by the respondent's counsel, the question whether the maintenance allowance was a personal one restricted in its enjoyment or not was never raised before their Lordships nor discussed.

In the present case, it is inconceivable that there should have been an intention that the right would be transferable to strangers. At any rate, in the absence of any clear provision in the deed that it is alienable, we are not prepared to hold that it is so. The mere fact that the payment is secured by a charge on immoveable property is by itself, as observed by MOOKERJEE, J., by no means conclusive. We would therefore hold that the right to recover future allowances as they fall due has not been validly transferred.

As it is obvious that the cash consideration offered by the vendee was for the whole contract of transferring her right to maintenance, past and future, and one part of such contract is not enforceable in law, the whole contract on which the transfer is based must fall to the ground. The plaintiff herself claimed the relief to have the transaction set aside. It would also be unfair to the defendant that he should be compelled to pay the whole consideration and yet not get any right to recover the future maintenance allowances. In these circumstances we think it just and equitable that the sale-deed dated the 2nd of September, 1921, should be cancelled and declared to be null and void and the plaintiff given a decree for recovery of the property so transferred on condition of the

(1) (1901) I. L. R., 28 Cal., 621.

plaintiff depositing in the court below within six months 1929  
 from this date the whole of the amounts received by her ALTAF BEGAM  
 together with interest at 6 per cent. per annum, simple, v.  
 as set forth in paragraph 11 of the plaint, after deducting BRIJ NARAIN.  
 any amount that the defendant shall have received by  
 execution of the decree for past arrears or by a separate  
 suit. As on the disputed points both parties have failed  
 partially we direct that they should bear their own costs  
 in both courts. The amounts realized by the defendant  
 will be credited to the plaintiff on the dates of such re-  
 alization and interest to that extent would cease to run  
 from such dates. If the amount is not deposited within  
 the time allowed, the suit will stand dismissed in both  
 courts.

*Before Mr. Justice Sulaiman and Mr. Justice Kendall.*  
 DASAMI SAHU (DEFENDANT) v. PARAM SHAMESH- 1929  
 WAR (PLAINTIFF) AND CHITTARANJAN MUKERJI January, 24.  
 (DEFENDANT.)\*

*Hindu law—Religious endowment—Dedication to idol—Revo-  
 cation—Adverse possession as against idol by donor him-  
 self.*

In the absence of fraud, undue influence and misrep-  
 resentation, if a valid dedication has once been completed, there  
 would be no power left in the donor to revoke it. And no  
 assertion on his part or subsequent conduct contrary to such  
 dedication would have the effect of nullifying it.

Adverse possession exercised by the donor himself, to the  
 ouster and knowledge of the *shebait* who alone held the pro-  
 perty on behalf of the idol, would mature into title after the  
 lapse of the prescribed period.

*Sri Thakurji v. Sukhdeo Singh* (1) and *Ram Dhan v.*  
*Prayag Narain* (2), distinguished. *Jadu Nath Singh v.*  
*Thakur Sita Ramji* (3), referred to. *Jagadindra Nath Roy*  
*v. Hemanta Kumari Debi* (4), *Chitar Mal v. Panchu Lal* (5)  
 and *Damodar Das v. Lakhan Das* (6), followed.

\* First Appeal No. 87 of 1926, from a decree of Hanuman Prasad  
 Verma, Subordinate Judge of Benares, dated the 23rd of December, 1925.

(1) (1920) I. L. R., 42 All., 395.

(2) (1921) I. L. R., 43 All., 503.

(3) (1917) I. L. R., 39 All., 553.

(4) (1904) I. L. R., 32 Cal., 129.

(5) (1925) I. L. R., 48 All., 348.

(6) (1910) I. L. R., 37 Cal., 885.

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Babu Peary Lal Banerji, for the appellant.

Munshi Kamla Kant Varma and Munshi Ambika Prasad, for the respondents.

SULAIMAN AND KENDALL, JJ. :—This is a defendant's appeal arising out of a suit for a declaration that the house in dispute was *debutter* or trust property and was not alienable. It originally belonged to the ancestor of the defendant Chittaranjan Mukharji and was sold away at auction and purchased by a stranger in 1878. Later on it was transferred by the auction purchaser to Chittaranjan's father and has been held by the family since then. The father of Chittaranjan died when the latter was a minor, 5 years old. He was brought up by his uncle Niranjan Mukharji who was appointed a certificated guardian. About 1902 Chittaranjan attained majority, but the management of his property, which consisted mainly of this house and some Government securities, remained in the hands of his uncle Niranjan Mukharji. On the 2nd of June, 1908, a registered deed of release was executed by Chittaranjan in favour of his uncle Niranjan, stating that he had received all the accounts and received back what was due to him. On the same day Chittaranjan executed a deed of endowment dedicating the house in dispute in favour of three family idols and appointing his own mother as the *shebait* of the said idols. The deed of dedication specifically mentioned that Chittaranjan had ceased to be the owner of the property which had passed to the idols, and that possession had been transferred to his mother who was the *shebait*. It went on to provide, however, that the donor and his uncle and his heirs would have full power to see to it that the daily worship of the said idols was performed duly and regularly with the income from the said house. It is an admitted fact that no application for change of names was made in the Municipal Board of Benares,

within the limits of which this house was situated, and it is also admitted that there was no mutation of names in the revenue papers with regard to the land on which the house stood. The subsequent conduct of Chittaranjan further shows that he was paying the municipal taxes.

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On the 7th of July, 1909, Chittaranjan and his mother jointly executed a mortgage-deed of this property. Chittaranjan described himself as the owner in possession of the premises, and his mother asserted that she had a charge of maintenance on it. They purported to mortgage the property in their own right as well as the *shebait*s of the idols; and the purpose for which the money was required was to carry out repairs of the house and to pay off debts which had been contracted for carrying on the worship of the idols. The deed of dedication was shown to the mortgagee.

On the 7th of March, 1910, both Chittaranjan and his mother executed a deed of revocation, stating that Chittaranjan had been in proprietary possession and enjoyment of the property always, and that it was owing to a deception practised upon him by his uncle that he had been made to execute the document of the 2nd of June, 1908, which was not enforceable, and he accordingly cancelled and nullified it by this deed of revocation, and that to this revocation his mother who had been appointed *shebait* under the deed had agreed and affixed her signature. It is stated by one witness that registered notices announcing the revocation were circulated and one of them was sent to Niranjan Mukharji and in 1911 Chittaranjan applied for and obtained permission for putting up a scaffolding.

On the 13th of May, 1914, Chittaranjan made a second mortgage of this property in favour of Shiam Sunder. Neither the previous mortgage-deed nor the

1929 deed of endowment nor the deed of revocation was expressly mentioned in this document. But care was taken to make the mortgagor liable in case such prior incumbrances were discovered. Shiam Sunder instituted a suit on the basis of this mortgage-deed and obtained a decree in March, 1922. This decree was put in execution and the property was proclaimed to be sold on the 20th of April, 1923. Three days before the date fixed for the sale, a mortgage in favour of the appellant was executed by Chittaranjan, viz. on the 17th of April, 1923. Under this document Chittaranjan received Rs. 165 at the time of registration, and the rest of the amount was left in the hands of the mortgagee for payment of the prior mortgagee, who was described as a creditor on the strength of a hand note, as well as the decretal amount.

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The plaintiff wanted to avoid this last mortgage-deed by the declaration that the property was not transferable. The contesting defendant pleaded that there had been no valid dedication, that the said deed of endowment had been executed under undue influence and misrepresentation, and that it was never acted upon or given effect to. There was a further plea that it had been duly revoked, and in any case there had been adverse possession for more than 12 years against the idols. Lastly it was pleaded that the amount of the mortgage money had been taken for purposes of legal necessity and was binding on the trust property.

The learned Subordinate Judge has decreed the claim, holding that there was a valid dedication which could not have been revoked, and that there was no limitation. He has further held that although the amount borrowed might have been for legal necessity, the defendant had not established that he had paid the said amount.

The plea of misrepresentation or undue influence alleged to have been exercised by Niranjana on Chittaranjan has not been pressed before us. We must therefore take it that the deed of endowment was duly executed and registered by Chittaranjan on the 2nd of June, 1908.

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The question whether it created a valid dedication depends on whether there was a real intention to dedicate the property and the dedication was completed. No doubt there may be circumstances under which the mere execution and registration of a deed of endowment may not amount to a complete dedication and the proceeding may be merely a nominal one. On the other hand it is also clear that if a valid dedication has once been completed there would be no power left in the donor to revoke it, and no assertion on his part or subsequent conduct contrary to such dedication would have the effect of nullifying it. Not only the language of the document but the surrounding circumstances as well as subsequent conduct may be taken into consideration when finding whether there was a real intention to dedicate the property. The learned advocate for the appellant has strongly relied on the circumstance that no mutation took place on the strength of this dedication, and that no attempt has been made to produce accounts which would show that the whole of the income of the house was spent for the purposes of the endowment. He has strongly relied on the Full Bench case of this Court in *Sri Thakurji v. Sukhdeo Singh* (1). The principle underlying that decision has been followed subsequently by two of the learned Judges in *Ram Dhan v. Prayag Narain* (2). But the question whether there was a real intention to dedicate the property is a matter of inference from the various circumstances and by no means an abstract question of law.

(1) (1920) I. L. R., 42 All., 395.

(2) (1921) I. L. R., 43 All., 503.



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We may point out that in the case of *Jadu Nath Singh v. Thakur Sita Ramji* (1) there had also been a dedication not followed by mutation of names and there was a non-production of accounts showing that the *waqf* had been acted upon. Nevertheless in that case their Lordships of the Privy Council upheld the dedication. In the case before us the omission to apply for mutation of names can be explained to some extent by the circumstance that this was a house property situated in the city of Benares, as regards which the mutation of names may not be of the same importance as that with regard to zamindari property. In any case this omission by itself does not necessarily show that the deed was not acted upon. The oral evidence does indicate that the mother of Chittaranjan who had been appointed *shebait* actually lived in this house, and the worship of the idols had been carried on as it had been done before.

We come next to the mortgage-deed of 1909. The phraseology of this document is very curious and in some respects it is contradictory. But it is quite clear to us that this is the result of an anxiety in the mind of the mortgagee to take the mortgage from both Chittaranjan and his mother in both their capacities of owners and trustees. It is on account of this double capacity that the document has been carefully worded. There is no suggestion that the deed of dedication was a nullity or that it has been cancelled. On the other hand it is recited that it was one of the documents which was shown to the mortgagee. The amount borrowed is also stated to have been required for the repairs of the house and to pay off debts incurred for carrying on the worship of the idols. These were purposes of the trust. Both Chittaranjan and his mother are described as *shebait*s. Although there are recitals to the effect that one is the owner in possession and the other had a charge of main-

(1) (1917) I. L. R., 39 All., 553.

tenance on the premises, we are not satisfied that there was any clear assertion in this document that the deed of endowment had been a nullity from the very beginning or that it had been revoked.

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From these circumstances the court below has inferred that there had been a real intention to dedicate the property. We find ourselves unable to differ from that view. We must, therefore, hold that the deed of 1908 was not a nullity from its very inception.

The next question to consider is whether adverse possession for more than 12 years has put an end to this endowment. Under the deed possession was to pass from Chittaranjan to his mother, who was entitled to live in the house or let it out on rent as the *shebait* of the idols, and was to spend the income on the worship of those idols. We have already pointed out that no mutation of names followed, and the payment of the municipal taxes continued to be made by Chittaranjan himself. In 1910 Chittaranjan and his mother both joined in executing the deed of revocation by which it was made clear that the executants had agreed that the endowment had ceased to be effective. That deed further recited that Chittaranjan had himself been in proprietary possession and in enjoyment of the property. From that moment therefore the character of the possession of Chittaranjan over the house must be deemed to have been adverse as against the idols, of whom his mother was the *shebait*. It was after this that Chittaranjan applied to the Municipal Board as owner of the house for permission to make additions, and he did put up a scaffolding presumably at his own expense. There is nothing to show that he surrendered possession to his mother in her capacity as the *shebait* of the idols after the revocation. On the other hand, even if she occasionally



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lived in the house she might well live in it because of her relationship with Chittaranjan. For over 12 years this state of things continued, and there was no assertion made on behalf of Nirranjan or his heirs to intervene, or to see that the names of the idols were duly entered either in the municipal or the revenue papers. In 1914 there was a further mortgage created by Chittaranjan on this property in assertion of his own proprietary interest. This also was a registered document. A decree was obtained on the basis of this document, and the property was put up for sale at a public auction. The present defendant advanced his money more than 12 years after the deed of revocation had been executed, and even if he had got the registration registers searched for 12 years he might not have discovered the earlier document. In any case the revocation itself had stood for more than 12 years and the possession of Chittaranjan over the house has remained for all that period without doubt.

The learned advocate for the respondent has argued before us that in the circumstances of this case there could have been no adverse possession at all. The view of the court below that there could not be any adverse possession because the idols themselves remained in the house cannot for a moment be accepted. As a matter of fact there can be adverse possession, not only as against the idols but over the idols themselves. That adverse possession can be acquired against idols in respect of property dedicated in their favour is fully clear from several cases decided by their Lordships of the Privy Council. We may refer to *Jagadindra Nath Roy v. Hemanta Kumari Debi* (1) which was followed by this Court in the case of *Chitar Mal v. Panchu Lal* (2). We may also refer to the case of *Damodar Das v. Lakhan Das* (3).

(1) (1904) I. L. R., 32 Cal., 129.

(2) (1925) I. L. R., 48 All., 348.

(3) (1910) I. L. R., 37 Cal., 885.

In our opinion the same principle applies whether the adverse possession is exercised by a total stranger or by the donor himself. So long as such possession is exercised to the ouster and knowledge of Chittaranjan's mother, who alone can hold the property on behalf of the idols, it would mature into title after the lapse of the prescribed period.

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The learned advocate for the respondent has drawn our attention to the clause in the deed of dedication authorizing Chittaranjan to see to the proper carrying on of the worship. That conferred on him a right of intervention but it in no way amounted to a vesting of the trust property in him nor did it constitute him a trustee. There was therefore no bar to his exercising adverse possession or acquiring title by adverse possession over this property.

We accordingly allow this appeal and setting aside the decree of the court below dismiss the plaintiff's suit with costs.

*Before Mr. Justice Sulaiman and Mr. Justice Kendall.*

BACHCHI LAL AND OTHERS (DEFENDANTS) v. DEBI DIN AND OTHERS (DEFENDANTS) AND BENI PRASAD AND OTHERS (PLAINTIFFS).\* 1929  
January, 25.

*Act (Local) No. XI of 1922 (Agra Pre-emption Act), sections 4(1) and 20—"Co-sharer"—Indefeasible interest—Full proprietary title necessary—Estoppel—Invalid transfer together with estoppel does not confer proprietary title.*

For a person to become a co-sharer within the meaning of section 4(1) of the Agra Pre-emption Act it is necessary that he should be entitled as proprietor to a share in the mahal. A right short of proprietary title will not do; nor can a person in adverse possession without actual title be said to be entitled

\* First Appeal No. 157 of 1926, from a decree of Jamuna Narain Dikshit, Additional Subordinate Judge of Banda, dated the 22nd of February, 1926.

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as proprietor to the property in his possession so long as his title has not matured by prescription. The expression "indefeasible interest" in section 20 of the Agra Pre-emption Act also refers to full proprietary title which is not liable to be defeated.

An oral gift of immovable property by a Hindu widow, followed by the donee's possession, even if supplemented by circumstances creating an estoppel against the reversioners' challenging the validity of the gift, will not, unless the possession has been for twelve years, vest any proprietary title in the donee.

*Fateh Singh v. Thakur Rukmini Ramanji Maharaj* (1), distinguished.

Babu Piary Lal Banerji and Munshi Ambika Prasad, for the appellants.

Mr. Mahmud-ullah and Munshi Sarkar Bahadur Johari, for the respondents.

SULAIMAN and KENDALL, JJ. :—First Appeals Nos. 157 and 158 of 1926 are connected and are defendants' appeals arising out of two suits for pre-emption. Under a sale-deed, dated the 9th of August, 1924, shares in two khatahs Nos. 2 and 7 in mahal Mustaqil and mahal Ihtimali of village Tirmau were sold to the defendants. Two suits were separately instituted. The plaintiff alleged that the defendants vendees were strangers and their names were wrongly recorded in the revenue papers. The defence raised by the defendants was that they were co-sharers on the same footing as the plaintiff. The defendants claimed title through one Jagannath. Before the trial commenced, the plaintiff's counsel made it clear that he was not admitting the title of Jagannath at all.

The court below has found in favour of the plaintiff and has decreed the claim except as regards mahal Ihtimali in which the defendants had become co-sharers by virtue of a deed of gift, dated the 15th of November, 1920.

Sewak was a proprietor in this village, and he died some time ago and was succeeded by his widow Musammat Jasodia. She also died some time about 1918. After her death the patwari reported that the names of Sewak's collaterals, Ramadhin and another, should be entered in the column of proprietors. An objection was made on behalf of Jagannath, who claimed that Musammat Jasodia had made a gift of the property in his favour and he was in possession as a donee. Apparently there was no registered deed and Jagannath was relying on an oral gift. On the 7th of May, 1919, an application was filed on behalf of Ramadhin purporting to act for himself and as *sarbarahkar* (or guardian) of Tissu and Gopi, in which the gift in favour of Jagannath was admitted, and there was a statement that the petitioners refused to take back the property and agreed to the mutation of names in favour of Jagannath. The court accordingly ordered that the name of Jagannath should be entered in place of the deceased Musammat Jasodia.

The plaintiff led no evidence in the court below to show that any one other than Ramadhin and Gopi were the collaterals entitled to succeed on the death of Musammat Jasodia. Nor was it made clear before the court who Tissu was, as whose guardian Ramadhin had acted. In the absence of such evidence the court below has assumed that Ramadhin and Gopi were the next reversioners of Musammat Jasodia's husband, and that therefore there was a consent on the part of the persons in whom the property had become vested on her death. The learned Judge has also assumed in favour of the defendants that this consent of the reversioners will estop them from ousting Jagannath and from taking possession from his vendees, the present defendants, but has held that consent cannot confer perfect title on Jagannath and his vendees so long as the full period of 12 years has not expired.

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In appeal before us it is contended that inasmuch as the reversioners who became entitled to the estate are estopped from recovering possession of the property from Jagannath and his transferees, and the heirs who would come after them would have to claim through them, the defendants had acquired an indefeasible title which is by no means liable to be defeated, and that inasmuch as they are in possession in the capacity of proprietors they can defeat the claim of the plaintiff. Great reliance is placed on the Full Bench case of *Fateh Singh v. Thakur Rukmini Ramanji Maharaj* (1).

In the case before the Full Bench there was a registered deed of transfer by the widow in her life-time, but the consent had been given by the reversioners before they had become entitled to the estate. In the present case the consent was given after such title had accrued, but there had never been any deed of gift by the lady at all. Without deciding that the consent of Ramadhin and Gopi would operate as an estoppel against them and their representatives, we may for the purposes of this appeal assume that it would so operate. In this view it is unnecessary for us to examine whether this consent was for consideration or not. But it is clear to us that no interest in immovable property can validly pass from one person to another in the eye of the law without there being a registered document of transfer. Under section 123 of the Transfer of Property Act a gift can only be effected by means of a document duly registered. In the absence of such document, the proprietary interest in the property could not have passed from Musammat Jasodia to Jagannath or from Ramadhin and Gopi to Jagannath. Even if Ramadhin and Gopi or their heirs be estopped from claiming the possession of the property it is impossible to hold that proprietary title has actually become vested in Jagannath or his transferee.

(1) (1923) I. L. R., 45 All., 339.

For a person to become a co-sharer under the Agra Pre-emption Act it is necessary under section 4, sub-clause (1) that he should be entitled as proprietor to a share in the mahal. A right, short of a proprietary title, e.g., that of a lessee or mortgagee, will not do. A person in adverse possession without actual title cannot be said to be entitled as proprietor to the property in his possession so long as his title has not matured by prescription. We think that the expression "indefeasible interest" in section 20 also refers to full proprietary title which is not liable to be defeated. So long as proprietary title has not been acquired the defendant cannot successfully resist a claim by a co-sharer for pre-emption. Estoppel against the heirs is one thing and acquisition of title as proprietor is another. And of course the word interest can not include an interest less than a proprietary interest.

The court below has held that the agreement for mutation of names in favour of Jagannath in the revenue court was not in the nature of a family arrangement which would confer title on Jagannath. The application itself does not indicate that there had previously been any such family settlement. Nor is it clear that there was any *bona fide* dispute, nor could Jagannath, the son-in-law of Musammat Jasodia, be treated as a member of the family of Ramadhin and Gopi. The plea of a family settlement also was not raised in the written statement. We are therefore unable to hold that there was any such family settlement as, even in the absence of a registered document, could confer title on Jagannath. The result therefore is that the defendants cannot resist the plaintiff's claim on the basis of the alleged oral gift made to their vendor Jagannath.

Under the gift of the 15th of November, 1920, the defendants have acquired a share in patti No. 10 in mahal Mustaqil only. The shares sold are situated in khewats Nos. 2 and 7 which are in patti Sheo Din and patti Kalu

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respectively. According to the khewat, mahal Mustaqil is divided into several bahris, each bahri being subdivided into pattis and each patti into several khewats. Khewat No. 1 is in patti Sukhnandan. Khewats Nos. 2 and 3 are in patti Sheo Din. The areas of the two pattis are totalled separately and then the two are added together to make up bahri Gur Bakhsh Singh. The same process is followed as regards other bahris. It is clear to us therefore that bahri is a sub-division of the mahal very much like a thok, which is found in eastern districts. The plaintiff is undoubtedly a co-sharer in bahri Gur Bakhsh in which khewat No. 1 is situated. The defendants are not co-sharers in this bahri. The plaintiff accordingly has preference under section 12, sub-clause (3).

As regards khewat No. 7 which is situated in patti Kalu, we find that it is a part of another bahri called bahri Sheo Shankar and khewat No. 10 in which the defendants had become co-sharers is situated in the same bahri. As regards this khewat therefore the plaintiff cannot have preference as against the defendants. The learned Subordinate Judge has accordingly dismissed the claim with regard to this last-mentioned khewat.

In our opinion the view taken by the court below was correct and the decrees are right. Both the appeals are accordingly dismissed with costs.

#### REVISIONAL CIVIL.

*Before Mr. Justice Dalal.*

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January, 29.

AWADH BIHARI AND ANOTHER (DECREE-HOLDERS) v.  
FAHIMAN AND OTHERS (JUDGEMENT-DEBTORS).\*

*Civil Procedure Code, order IX, rule 13 and order XXXIV, rule 3—Final decree for foreclosure passed ex parte—Setting aside ex parte decree—Jurisdiction.*

Although order XXXIV, rule 3, of the Civil Procedure Code does not require notice to be given to the defendant

\*Civil Revision No. 320 of 1928.

before the passing of a final decree for foreclosure, yet if on account of the want of such notice the defendant is absent and the final decree is passed in his absence, such decree is an *ex parte* decree and the provisions of order IX, rule 13, are applicable to it. The court has jurisdiction to set it aside if there was sufficient cause for the non-appearance of the defendant; and want of knowledge of the plaintiff's application for a final decree is a sufficient cause.

*Mahadeo Pande v. Somnath Pande* (1), *Ramji Lal v. Karan Singh* (2), *Sital Singh v. Baijnath Prasad* (3) and *Bibi Tasliman v. Harihar Mahto* (4), referred to.

Munshi Shiva Prasad Sinha, for the applicants.

Pandit Misri Lal Chaturvedi, for the opposite parties.

DALAL, J.:—This Court had the advantage of having all the law on the subject placed before it with great care by Mr. Sinha and by Mr. Pande.

The applicants are decree-holders and they complained that the final foreclosure decree passed under order XXXIV, rule 3, of the Code of Civil Procedure for foreclosure in favour of the plaintiff has been set aside by the trial court without jurisdiction. This was their main ground of attack. Mr. Sinha, however, developed his argument and submitted that even if the trial court had jurisdiction it was not properly exercised. The suit on the mortgage resulted in a preliminary decree for foreclosure in pursuance of a compromise between the parties, according to which the plaintiff was held entitled to recover a certain amount of money from the defendants. The conditions were that the amount should be paid within nine months; that on such payment the property would be held to have been redeemed, and on non-payment the property was to be foreclosed. There could not be any foreclosure without a final decree of the court under rule 3. As required by law the plaintiff applied under clause (2) of that rule. That rule is to the effect

(1) (1926) I. L. R., 48 All., 828.

(2) (1917) I. L. R., 39 All., 532.

(3) (1922) I. L. R., 44 All., 668.

(4) (1905) I. L. R., 32 Cal., 253.

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that "where such payment is not so made the court shall on application made in that behalf by the plaintiff pass a decree that the defendant and all persons claiming through or under him be debarred from all rights to redeem the mortgaged property, and also, if necessary, ordering the defendant to put the plaintiff in possession of the property." There is, however, a proviso modifying the mandatory nature of the injunction to the effect that "the court may, upon good cause shown, and upon such terms, if any, as it thinks fit, from time to time postpone the date fixed for such payment." I have quoted the rule fully in order to show that the defendant had an interest in making the payment when the plaintiff applied for the passing of the final decree, even though he was not prepared at that very time to pay the money decreed in the preliminary decree at once.

On application by the plaintiff the court ordered a notice to issue to the defendant. It was not served on the defendant personally. On the date fixed for hearing the defendant did not appear, and a final decree for foreclosure was passed. In terms of that decree the property was foreclosed, and the plaintiff became owner of the property.

Subsequently, within the period of limitation, the defendant applied to have this *ex parte* decree set aside. An order setting aside the *ex parte* decree was passed by the Munsif of Cawnpore. This is an application in revision from that order.

The first argument on behalf of the plaintiff was that the final decree could not be termed *ex parte* because no notice to the defendant has been prescribed under rule 3 of order XXXIV, of the Code of Civil Procedure. It has been held by a Bench of two Judges in this Court

that no notice is necessary : *Mahadeo Pande v. Somnath Pande* (1). So it is not necessary to pursue this matter further. It was not held, however, in that case that by reason of no notice being necessary a decree passed in the absence of the defendant would not be termed an *ex parte* decree. The proceedings between the preliminary and the final decree in a suit for foreclosure, that is, between the decree prescribed by rule 2 and the decree prescribed by rule 3, are held by this Court to be proceedings in suit : *Ramji Lal v. Karan Singh* (2) and *Sital Singh v. Baijnath Prasad* (3). For that reason my opinion is that the provisions of order IX will attach to those proceedings. Under rule 6 when the plaintiff alone appears and the defendant does not appear the court passes an *ex parte* decree. Such a decree can be set aside by the court under rule 13 of order IX. A Full Bench of the Calcutta High Court held in *Bibi Tasliman v. Harihar Mahto* (4) that a court had inherent jurisdiction to set aside an order passed in *ex parte* proceedings. This was a case where the provisions of the Transfer of Property Act applied to proceedings in mortgage suits, and an application was made to set aside an order absolute for sale. It was conceded in that case also that an order absolute for sale may be passed without any notice to the judgement-debtor. Proceedings subsequent to the preliminary decree for sale were treated prior to 1908 as proceedings in execution. No provision was made applicable to such proceedings for a rehearing. Even so, the inherent power of a court to set aside *ex parte* proceedings was recognized. In my opinion, after Act No. V of 1908 the case is much stronger because the proceedings subsequent to a preliminary decree are proceedings in suit and a decree passed in the absence of the defendant must be considered an *ex parte* decree, and

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(1) (1926) I. L. R., 48 All., 828.

(2) (1917) I. L. R., 39 All., 532.

(3) (1922) I. L. R., 44 All., 668.

(4) (1905) I. L. R., 32 Cal., 253.

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there does not appear to be anything in the Code to prevent the provisions of rule 13 of order IX attaching to such a decree. The same view was taken by the Bombay High Court in a case tried by the Presidency Court of Small Causes where the proceedings under Chapter VII of the Presidency Small Cause Courts Act (No. XV of 1882) were admittedly not proceedings in a suit. The learned Judges who heard the reference were of opinion that the court of small causes had an inherent power to set aside an *ex parte* order. In the Allahabad case already cited in I. L. R., 48 All., the two learned Judges who delivered judgement found nothing in the case of *Bibi Tasliman* inconsistent with the view they had taken that a notice was not necessary to be issued to the defendant under rule 3.

It cannot be denied, however, that the defendant was entitled to be present at the time of the passing of the decree. The trial court has rightly drawn attention to the form of the final decree for foreclosure where mention is specifically made of the court having heard the pleader for the defendant (Civil Procedure Code Appendix D, form No. 10). When the defendant was at liberty to be present I am of opinion that a decree passed in his absence was an *ex parte* decree. When the decree was an *ex parte* decree, the court had jurisdiction to set it aside.

The next argument of Mr. *Sinha* was that the court exercised its jurisdiction illegally and with material irregularity in setting aside the decree. Under rule 13 the court has power to set aside a decree if the court is satisfied that the defendant was not duly served with summons, or was prevented by any sufficient cause from appearing when the suit was called on for hearing. The argument was that when no notice was necessary there can be no question of his being prevented from appearing

when the suit was called on for hearing. What I think important to notice is that though no notice was necessary he had a right to appear and to be heard, and, therefore, he was entitled to show that he was prevented by a sufficient cause from appearing when the suit was called on for hearing. There are two distinct divisions of the rule, one dealing with summons and the other independent of summons, referring to a sufficient cause preventing appearance. In my opinion the trial court was right in holding that the defendant had sufficient cause to prevent him from appearing when the suit was called. He had engaged a pleader and in ordinary course would have thought that he would be informed of the date of hearing. There was no particular date of hearing fixed under the preliminary decree. It was open to the plaintiff to apply for the passing of a final decree at any time after nine months from the date of the preliminary decree. Under the circumstances the defendant was prevented from appearing on the date of the hearing of the final decree by want of knowledge of the plaintiff's proceedings. The trial court had jurisdiction to set aside the *ex parte* decree and has not exercised it irregularly. I dismiss this application with costs.

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## APPELLATE CIVIL.

*Before Mr. Justice Mukerji and Mr. Justice Niamat-ullah.*

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January, 29

KHAIR-UN-NISSA BIBI (PLAINTIFF) *v.* OUDH COMMERCIAL BANK, LTD., AND OTHERS (DEFENDANTS).\*

*Civil Procedure Code, order XXXIV, rule 5—Final decree for sale passed pending an appeal from a preliminary decree—Validity.*

A final decree for sale on foot of a mortgage, passed during the pendency of an appeal from the preliminary decree which is eventually affirmed by the court of appeal, is valid and binding on the parties and is capable of execution; but since it can not include costs of the appellate court the mortgagee seeking to execute it cannot insist on including such costs, as he could do if he obtained a final decree on foot of the preliminary decree passed on appeal. *Lalman v. Shiam Singh* (1), distinguished. *Gajadhar Singh v. Kishan Jiwan Lal* (2), *Fitzholmes v. Bank of Upper India, Ltd.*, (3) and *Jowad Husain v. Gendan Singh* (4), referred to.

Maulvi Iqbal Ahmad and Maulvi Mukhtar Ahmad,  
for the appellant.

Dr. Kailas Nath Katju and Munshi Shabd Saran,  
for the respondents.

MUKERJI, J.:—The plaintiff is the appellant in this Court. She instituted the suit out of which this appeal has arisen under the following circumstances.

The Oudh Commercial Bank, Ltd., Fyzabad, the respondent in this appeal, obtained a decree for sale on foot of a mortgage executed by two persons, viz. Saliha Bibi and her husband Riasat Husain. Saliha

\*First Appeal No. 313 of 1925, from a decree of Krishna Das, Additional Subordinate Judge of Azamgarh, dated the 18th of April, 1925.

(1) (1925) 24 A. L. J., 288.

(2) (1917) I. L. R., 39 All., 641.

(3) (1926) I. L. R., 8 Lah., 253.

(4) (1926) 24 A. L. J., 765.

Bibi was a first paternal cousin of the plaintiff and, according to the Shia law to which Saliha Bibi was subject, on her death the plaintiff became the sole heir of her property. The decree was passed against Saliha Bibi and her husband and was followed by a final decree for sale on the 16th of December, 1915. When the final decree was passed, an appeal against the preliminary decree was pending in the court of the Judicial Commissioner, Lucknow. That court dismissed the appeal against the preliminary decree on the 26th of July, 1916. Riasat Husain died in June, 1916, and Saliha Bibi died in December, 1918. There was a dispute as to who should succeed to the estate of Saliha Bibi. It appears that nobody knew, at the time, not even the plaintiff herself, that the plaintiff Khair-un-nissa was the heir to Saliha Bibi. Khair-un-nissa was married to Riasat Husain as was her cousin Saliha Bibi. Khair-un-nissa has a son in Marahmat Husain, who is the defendant No. 2 in this suit, by Riasat Husain, her husband. Fearing that collateral relations would take the property of Saliha Bibi, Khair-un-nissa falsely set up her own son as the son of Saliha Bibi. There was a litigation, and ultimately it was established that Khair-un-nissa was the sole heir of Saliha Bibi. The respondents, the decree-holders, impleaded, for the purpose of the execution of their decree, a whole host of persons, viz., defendants Nos. 2 to 10 of the present suit. Marahmat Husain, being a minor, was impleaded under the guardianship of his mother Khair-un-nissa. The plaintiff brought the suit, out of which this appeal has arisen, to obtain a declaration that she was not made a party to the execution proceedings and her contention was that she, the only legal heir, not being before the court, the decree had become barred by time. She sought a declaration that the decree had become time-barred and the property mortgaged was not capable of being sold in execution of that

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decree. Evidently, this last prayer was meant to follow as a corollary to the main proposition that the decree was time-barred.

A number of other and subsidiary questions of fact and law were raised in the suit, but they have all been decided by the learned Subordinate Judge and they have not been re-agitated before us. The learned Subordinate Judge, on one of the points raised, held that the suit was not barred by section 47 of the Civil Procedure Code. It was conceded before us that the suit, as brought, would be barred by section 47 and we are of the same opinion. She must raise the question of limitation in the execution proceedings, and not by a separate suit. The learned counsel for the appellant, however, sought to raise a new point and it being a point of law he was allowed to raise it. His argument was that the final decree which is sought to be executed, dated the 16th of December, 1915, was a nullity and was not binding on the plaintiff. If this was so, the present suit was maintainable and the plaintiff could obtain a declaration to that effect. We have, therefore, to consider how far this contention is correct.

The argument is based on this. As I have already pointed out, when the final decree was made in the mortgage suit on the 16th of December, 1915, an appeal against the preliminary decree was pending before the court of the Judicial Commissioner of Oudh. The appeal was dismissed on the 26th of July, 1916. It is contended that there could be only one final decree in the case and that decree could be passed only after the appeal from the preliminary decree had been disposed of. It was further urged that as the appeal was not decided till 1916, the final decree passed in 1915 was a nullity. A case decided by two learned Judges of this Court, viz. *Lalman v. Shiam Singh* (1), has been cited in support

(1) (1925) 24 A. L. J., 288.

of this proposition. This case goes to the full length of supporting the appellant's case. If the learned Judges had decided the question of *res judicata*, feebly urged before them, after consideration, we would have thought it necessary to refer the present question before a larger Bench. But I take it that the question of *res judicata* was not pressed before the learned Judges and the learned Judges did not direct their mind to a full consideration of the same.

The question of *res judicata* arises in this way. Granting for the sake of argument, that the final decree in a mortgage suit could not be passed till the appeal from the preliminary decree had been decided, we find it to be a dead fact that a final decree was passed as between the parties. The court that did pass the final decree was seised of the case and had the jurisdiction, therefore, to pass it. It may be, if the contention of the plaintiff be right, that the court acted wrongly in making the final decree and in disregarding the fact that an appeal from the preliminary decree was pending. The decree being there, rightly or wrongly passed, it binds the parties to it. The plaintiff's predecessor in title being bound by the decree, it is not open to the plaintiff to say that the decree is a nullity. This aspect of the case was presented before the learned Judges in 24 A. L. J., 288, but it was presented very feebly. The learned Judges brushed aside the argument by pointing out that the decree-holder sought execution not only of the final decree but also sought to realize the costs which had been granted by the appellate court in dismissing the appeal against the preliminary decree. If this was so, it would have been enough to dismiss that portion of the application for execution as sought to execute, by sale of the property, the decree for costs passed by the appellate court. If the decree-holder wanted a few rupees more than was warranted by the final decree, that would

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be no ground for saying that the final decree was a nullity.

I will now consider the argument of the plaintiff's counsel as apart from authority furnished by the case already discussed. The learned counsel relied on the case of *Gajadhar Singh v. Kishan Jiwan Lal* (1) and *Fitzholmes v. Bank of Upper India, Ltd.* (2) decided by their Lordships of the Privy Council, in which a certain statement of the law made by BANERJI, J., in the case in I. L. R. 39 All., 641, was approved. Both the cases were of limitation and the question arose whether for the purpose of applying for a final decree the decree-holder had three years from the date of the preliminary decree passed by the first court or from the date of the decision of the appellate court where there was an appeal from the preliminary decree. It appears that in an earlier case BANERJI, J., of this Court had held that limitation began to run from the date of the passing of the preliminary decree by the first court. In the case of *Gajadhar Singh v. Kishan Jiwan Lal* (1), the learned Judge modified his opinion and held that limitation would begin to run from the date of the final decision in appeal. In stating the law the learned Judge said that the law contemplated the passing of only one final decree and that final decree could be made only after the appellate court had decided the appeal from the preliminary decree. It is this dictum which has been approved of by their Lordships of the Privy Council.

As already pointed out, the point before the Full Bench in the case in I. L. R. 39 All., and the point in the case before their Lordships of the Privy Council in I. L. R., 8 Lah., 253 were ones of limitation. The question that we have to decide is not one of limitation but is whether a mortgagee who has obtained a decree

(1) (1917) I. L. R., 39 All., 641.

(2) (1926) I. L. R., 8 Lah., 253.

for sale is not entitled to ask for a final decree for sale, for the simple reason that an appeal has been preferred against the preliminary decree. Suppose for example, a suit for sale is brought for recovery of Rs. 52,000. The defendant contends that Rs. 4,000 claimed as interest was not recoverable. The contention is disallowed by the court of first instance and a decree is passed for the entire sum of Rs. 52,000. The defendant appeals only in so far as the decree was for recovery of Rs. 4,000, as interest. If it be the law that till the question of Rs. 4,000 is decided by the appellate court (it may take three years to decide the point) the decree-holder must wait and cannot realize the balance of the decretal amount as to which there is no dispute and must be content with the reduced rate of interest at 6 per cent. per annum, although the stipulated interest might be much larger, that law would surely be very very ungenerous and irksome. Surely, unless there be any express law to the effect, we must not deduce it from the dicta already quoted which fell from eminent Judges on a pure question of limitation.

Order XL, rule 5 of the Civil Procedure Code expressly lays down that the fact that an appeal is filed shall not, by itself, operate as a stay of execution. If we are to accept the appellant's contention that by virtue of preferring an appeal, for however small a portion of the decree it may be, a judgement-debtor can put off the execution of a mortgage decree, we must surely have an authority for that. No such authority is quoted. The case of a mortgage decree does not stand apart. The same remarks apply to decrees for, say, dissolution of partnership and accounts, decrees for partition, a decree against an agent for rendition of account and so on.

No doubt, where a preliminary decree has been interfered with by the appellate court, the final decree is affected to that extent. It is also clear that where a

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decree-holder proceeds to obtain a final decree in spite of the fact that an appeal against a preliminary decree is pending, he takes some risks in having to apply for a fresh final decree if the appellate court modifies the preliminary decree. But that is the case even where a simple money decree is passed. A simple money decree, say for Rs. 5,000, is passed. The decree-holder will have an absolute right to execute the decree at once although the defendant may prefer an appeal. If the appeal succeeds and if in the meanwhile the plaintiff has realized the decretal amount, he will have to refund the amount; but certainly nobody would argue that simply because the original decree stands the chance of being modified on appeal no execution could be taken out. Where a decree is passed by parts, as in the case of a suit on a mortgage, the decree can be executed only after a final decree has been made. There must be some clear authority for holding that the mere fact that an appeal against the preliminary decree is pending is a sufficient justification for postponing the passing of the final decree.

I am, therefore, clearly of opinion that the contention of the learned counsel for the appellant has no force and the final decree passed is not a nullity.

I need not go back to the question of *res judicata*. The final decree, whether it should or should not have been passed, has been passed and therefore no valid objection can be taken to its execution. The appellate decree has not in any way modified this final decree. There may be, but we do not know if it is the case, a decree for costs passed by the appellate court. That decree for costs may be a decree directing that the costs should be realized from the mortgaged property or it may be a decree directing that the unsuccessful respondent should pay the costs personally. If it is a personal decree, it will have to be executed independently. If

the appellate decree directs that the costs should come out of the property mortgaged, that decree will not be executed till a final decree is made including the appellate costs. In any view, the final decree as it stands is capable of execution and nobody who is a party to the execution, or his representative, can object to it.

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The result is that the appeal must fail. I would dismiss the appeal with costs.

NIAMAT-ULLAH, J. :—I am in complete agreement with the view taken by my learned brother and with the reasons assigned by him in support of it. I would add a few words of my own as I feel strongly on the question whether the final decree passed during the pendency of an appeal from the preliminary decree which is eventually affirmed by the court of appeal is a nullity. Reliance is placed on behalf of the appellant on *Lalman v. Shiam Singh* (1) for the proposition that such a final decree is not capable of execution. This view, if accepted, will lead to some startling results. Order XXXIV, rule 5, runs as follows :—

“(1) Where on or before the day fixed the defendant pays into court the amount declared due as aforesaid together with such subsequent costs as are mentioned in rule 10, the court shall pass a decree—

- (a) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up, and, if so required—
- (b) ordering him to retransfer the mortgaged property as directed in the said decree, and also, if necessary,—
- (c) ordering him to put the defendant in possession of the property.

(1) (1925) 24 A. L. J., 288.

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(2) Where such payment is not so made, the court *shall*, on application made in that behalf by the plaintiff, pass a decree that the mortgaged property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in rule 4."

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As soon as a suit for sale terminates in favour of the mortgagee a preliminary decree must follow. On the expiry of the usual period of grace, when payment is not made, the court "shall" pass a final decree "on application made in that behalf by the mortgagee." No notice of such application need be issued to the mortgagor, though one is usually issued. In view of the mandatory character of these provisions no court can refuse to pass a final decree if the mortgagee applies therefor. The mortgagor cannot be heard to say that he has preferred an appeal and therefore no final decree can be passed. This *reductio ad absurdum* becomes more marked if the provisions of order XXXIV, rules 2 and 3 are examined. When a preliminary decree is passed in a foreclosure suit it directs payment "on a day within six months from the date of declaring the amounts due to be fixed by the court" (rule 2) and "if such payment is not so made, the court *shall*, on application made in that behalf by the plaintiff, pass a decree that the defendant . . . be debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property." Then follows the proviso which proves the incorrectness of the view contended for, to demonstration. It is this:—"Provided that the court may, upon good cause shown and upon such terms (if any) as it thinks fit, from time to time postpone the day fixed for such payment."

If the preliminary decree has been appealed from there is, in that view, little room for the court to exercise a discretion given by the proviso, nor is there any

need for a mortgagor to apply for an extension of time as he can help himself to an extension if he has only preferred an appeal and in many cases to an extension for an inordinate length of time. If a case involves a substantial question of law an appeal to the Privy Council will afford great facilities for preventing the mortgagee from reaping the fruits of his decree. Where the mortgage money already exceeds the value of the mortgaged property, as it may do in many cases, the delay in passing a final decree in a foreclosure suit is calculated to deprive him of any return for the interest accruing in the meantime.

It is true a decree passed by a court of first instance, when affirmed on appeal, is merged in the appellate decree. But so long as no decree has been passed by the court of appeal it continues in full force, and the mortgagee can take action according to its tenor. It is open to a mortgagee to obtain a final decree, if otherwise entitled to it, even where an appeal is pending from the preliminary decree. But such a course entails some disadvantages, e.g. interest at contract rate is to be awarded up to the date fixed for payment by the preliminary decree and thereafter at such rate as the court may allow and if he waits for the appellate decree he would be entitled to interest at the contract rate for a longer period. Whether a decree passed by a court of first instance will merge in the decree of the appellate court affirming it when a final decree intervenes and the mortgagee insists on executing the final decree already obtained or whether he can throw up such final decree and obtain another on foot of the preliminary decree passed by the appellate court affirming that of the court of first instance, are questions which do not call for decision in this case. It is, however, clear to my mind that where a final decree was actually passed pending an eventually unsuccessful appeal from the preliminary decree, it is binding on the

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parties and is capable of execution. Since it cannot include costs of the appellate court and possibly interest at a higher rate for a certain period, the mortgagee seeking to execute it cannot insist on including such costs and such interest, as he can do if he obtains a final decree on foot of the preliminary decree on appeal. The case of *Lalman v. Shiam Singh* (1) is distinguishable for the reason last mentioned. The learned Judges in repelling the argument that the final decree passed rightly or wrongly was binding between the parties, observed: "The simple answer to it is that the mortgagee does not come merely on the basis of that decree as having been passed in his favour rightly or wrongly. He includes in his application for execution costs awarded to him by the High Court as well and it is clear that he has in contemplation the correct final decree which ought to be passed in the suit. Such a correct decree has not yet been passed, so there can be no question of its execution." In the case before us there is no suggestion, and the question having been raised for the first time in this Court there is no evidence, that the mortgagee is, in effect, seeking to execute the supposed final decree based on the preliminary decree passed on appeal. It is true there are *dicta* in this and other cases, which, taken apart from the facts to which they refer, lend support to the appellant's contention. *Gajadhar Singh v. Kishan Jiwan Lal* (2), *Jowad Husain v. Gendan Singh* (3) and *Fitzholmes v. The Bank of Upper India, Limited* (4), decide no more than that an application, made after the decision on appeal, for a final decree to be passed on foot of the preliminary decree passed on appeal, is not barred by article 181, Indian Limitation Act, if it is within three years from the date of the appellate decree, though beyond three years from the date of the preliminary decree passed by the court of first instance. They

(1) (1925) 24 A. L. J., 288.

(3) (1926) 24 A. L. J., 765.

(2) (1917) I. L. R., 39 All., 641.

(4) (1926) I. L. R., 8 Lah., 253.

can be no authority for the proposition that no final decree can be passed before the appeal is decided and, if passed, cannot be executed.

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For the reasons stated above, I concur in the order dismissing the appeal with costs.

By THE COURT :—The appeal is dismissed with costs.

*Before Mr. Justice Mukerji and Mr. Justice Niamat-ullah.*

HANWANT RAI (DEFENDANT) *v.* CHANDI PRASAD AND OTHERS (PLAINTIFFS) AND UMAN DATTA AND OTHERS (DEFENDANTS).\*

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Act No. IV of 1882 (*Transfer of Property Act*), section 55 (2)—*Implied covenant—Covenant running with the land—Indemnity clause—Vendees from pre-emptor of original vendee entitled to the benefit—Act No. IX of 1908. (Limitation Act), article 116—Applicability to implied covenant.*

On the 12th of February, 1912, *H* sold some zamindari property to *M* and others. By this sale-deed *H* agreed to indemnify the vendees if by any act of himself or by any claim of his children or the members of his family any defect arose in the property. *K* sued for pre-emption and on the 25th of January, 1913, obtained a decree and, thereafter, possession. On the 6th of August, 1916, *K* and his joint brothers sold half the pre-empted property to the plaintiffs Nos. 1, 2 and three others. No indemnity clause was inserted in this sale-deed. Subsequently the sons of *H* sued for cancellation of the sale-deed of 1912, and got a decree and obtained delivery of possession of the whole property on the 12th of March, 1921.

The present suit was filed, in 1925, for compensation for breach of contract, based on the indemnity clause contained in the earlier sale-deed of 1912, by the brothers and survivors of *K* and two of the five vendees.

\* First Appeal No. 96 of 1926, from a decree of Krishna Das, Additional Subordinate Judge of Azamgarh, dated the 21st of November, 1925.



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*Held* (1) that even if the vendees of *K* and his brothers could not succeed on the express covenant in the sale-deed of 1912, they were entitled to succeed on the implied covenant as to title which runs with the land, under section 55 (2) of the Transfer of Property Act;

(2) that article 116 of the Limitation Act applied and therefore the suit was within time;

(3) that the word "contract" used in article 116 of the Limitation Act should also include an implied contract.

*Gobind Dayal v. Inayat-ullah* (1), referred to; *Kundan Lal v. Bisheshar Dayal* (2) not followed; *Mul Kunwar v. Chat-tar Singh* (3), followed; *Janak Singh v. Walidad Khan* (4), not followed; *Nabin Chandra Ganguly v. Munshi Mander* (5), *Sigamani Pandithan v. Munibadra Nainar* (6), *Ganapa Putta Hegde v. Hammad Saiba* (7), *Injad Ali v. Mohini Chandra Adhikari* (8), and *Tricomdas Cooverji Bhoja v. Gopinath Jiu Thakur* (9), followed.

Babu Peary Lal Banerji and Munshi Kamla Kant Varma, for the appellant.

Maulvi Iqbal Ahmad, Maulvi Mukhtar Ahmad and Mr. Abu Ali, for the respondents.

MUKERJI and NIAMAT-ULLAH, JJ.:—This is an appeal by one who was arrayed as the defendant No. 1 in the original suit. The suit arose under the following circumstances.

The appellant Hanwant Rai sold, on the 12th of February, 1912, a certain amount of property to Mulai and two others for the sum of Rs. 9,000. Kauleshar Rai, who has since died, brought a suit for pre-emption on the 7th of September, 1912, and obtained a decree, on condition of payment of the entire consideration money of Rs. 9,000 on the 25th of January, 1913.

(1) (1885) I. L. R., 7 All., 775.

(3) (1908) I. L. R., 30 All., 402.

(5) (1927) I. L. R., 6 Pat., 606.

(7) (1925) I. L. R., 49 Bom., 596.

(2) (1927) I. L. R., 50 All., 95.

(4) (1915) 13 A. L. J., 669.

(6) [1926] A. I. R., (Mad.), 255.

(8) [1924] A. I. R., (Cal.), 148.

(9) (1916) I. L. R., 44 Cal., 759.

He deposited the money that he was required to do under the decree and obtained delivery of possession. The appeal to the High Court was dismissed. Kauleshar and his joint brothers, who are plaintiffs Nos. 3 and 4 in this action, sold a half share in the property pre-empted to the plaintiffs Nos. 1 and 2 of the suit and three others, on the 6th of August, 1916. The sons of Hanwant Rai challenged the sale made by their father, by suit No. 79 of 1919, and, eventually, got a decree for possession from the court of first instance and also by the court of appeal. The decree directed that on condition of payment of Rs. 2,761-8-0, the plaintiffs, namely the sons of Hanwant Rai, would be entitled to recover possession. They deposited the money and obtained delivery of possession on the 12th of March, 1921.

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Having thus been dispossessed of their property the present suit was instituted by the brothers and survivors of Kauleshar Rai and two of the five transferees. It has been found that the defendant No. 1, one of such transferees, has a small interest in the property mortgaged and that the other transferees, never having paid anything towards the sale consideration, did not obtain any interest in the property. The present suit was directed for the recovery of several sums of money, viz. Rs. 6,238-8-0, being the difference between the entire purchase money paid, viz. Rs. 9,000 and the sum of Rs. 2,761-8-0 paid by the sons as a condition precedent to their recovery of the property, for recovery of Rs. 1,400, being the costs incurred by the plaintiffs in defending the sons' suit, Rs. 566-8-0 being the costs paid by the plaintiffs to the sons under the decrees obtained by them and Rs. 4,336-14-6, interest on the sale consideration and other sums claimed.

The suit has been decreed in its entirety except for the sum of Rs. 1,400 which represented the amount of

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costs incurred by the plaintiffs in defending the sons' suit. The plaintiffs have not appealed, and as we have said, the present appeal is by Hanwant Rai alone.

Two points have been urged before us, namely, (1) the pre-emptor's vendees are not entitled to the benefit of the indemnity clause in the sale-deed executed by Hanwant Rai in favour of Mulai and others, and (2), the suit was barred by limitation.

We shall take up the first point first. The original sale-deed, namely the one executed by Hanwant in favour of Mulai and others, will be found printed at page 23 of the record. By this sale-deed, Hanwant Rai expressly agreed to indemnify the vendees in case by any act of himself or by any claim of his children or the members of his family, any defect arose in the property. It is conceded that Kauleshar Rai, having succeeded in his suit for pre-emption, was substituted for the original vendees, as the vendee. That this was the position of the pre-emptor is fully borne out by the Full Bench case of *Gobind Dayal v. Inayat Ullah* (1); vide the remarks of MAHMUD, J., at page 808. It is clear, therefore, that so far as Kauleshar's surviving brothers are concerned, there can be no doubt that the suit is maintainable on the indemnity clause contained in the sale-deed of the 12th of February, 1912. So far as the vendees are concerned, there are two positions. Either to them the benefit of the contract was transferred or it was not. If it was not transferred, the benefit of the contract remains entirely in Kauleshar's survivors. If they have lost the entire property which was obtained by pre-emption, they are entitled to recover the damages, irrespective of the fact that they have transferred half the property to other people. If to the vendees, the rights accruing under the indemnity clause have been assigned, they too are entitled to maintain the suit. Further it appears that

(1) (1885) I. L. R., 7 All., 775,

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under section 55, sub-section (2), of the Transfer of Property Act there is always an implied covenant as to title and this covenant runs with the land. If that be the case with respect to an implied contract, it seems to follow that an express contract of this nature must also run with the land. In any case, the vendees from Kauleshar Rai and his brothers are entitled to take the benefit of the implied contract contained in section 55, sub-section (2), of the Transfer of Property Act. In any view of the case, it is impossible to maintain on behalf of the defendant No. 1 that the suit is not maintainable by the vendees of Kauleshar Rai and his brothers.

We now come to the question of limitation. It is argued on behalf of Hanwant Rai that either article 62 or article 97 of the Limitation Act applies, and as the suit was brought more than three years after delivery of possession to the sons of Hanwant Rai, the suit is barred by time. Reliance has been placed on several cases and mainly on the case of *Kundan Lal v. Bisheshar Dayal* (1). This was a decision of a Bench of two learned Judges of this Court and the learned Judges thought that they had to choose between two cases decided in this Court. Those two cases were *Mul Kunwar v. Chattar Singh* (2) and *Janak Singh v. Walidad Khan* (3). In the case in I. L. R. 30 All., 402 it was expressly decided that in the circumstances of the present case article 116 of the Limitation Act applied. In the latter case in 13 A. L. J. at page 669, article 116 was not applied on the express ground that there was no covenant to which article 116 could be applied. Their Lordships analysed the document before them and expressly found that there were no covenants to which article 116 could apply. The earlier case of I. L. R. 30 All., 402, was not brought to the notice of the learned Judges. It was not necessary to do so. Their Lordships appear to have been fully

(1) (1927) I. L. R., 50 All., 95.

(2) (1908) I. L. R., 30 All., 402.

(3) (1915) 13 A. L. J., 669.

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alive to the contents of article 116 of the Limitation Act, but, as we have said, they expressly said that in the circumstances of that case there was nothing in the sale-deed to which article 116 could be applied. In the case under discussion in I. L. R., 50 All., one Calcutta case and a Madras case were also cited, but they were not discussed. In view of the fact that the case in I. L. R., 50 All. preferred to follow one of the cases to another of the cases decided in this Court, we think we are at liberty to accept the case in I. L. R., 30 All., 402, also a Bench decision, as a proper guide for us.

Considering the case apart from authority there can be little doubt that article 116 of the Limitation Act would be applicable. We shall presently show that that article has been applied not only in this Court, in the case of I. L. R. 30 All., but by several other High Courts in India and also by the Privy Council. Article 116 runs as follows: "Suit for compensation for the breach of a contract in writing registered: Period of limitation—six years: Time from which period runs—when period of limitation would begin to run against a suit brought on a similar contract not registered."

The contract in writing registered is that, in case the vendees lost the whole or any portion of the property on account of the claim made by the children of the vendor, they would be entitled to be indemnified. This is an express contract of indemnity. The cause of action would arise from the date of dispossession, a date which is within six years of the suit. Apart from authority, therefore, there can be no difficulty in the application of article 116. Even if it had been the case that there was no express covenant, the implied covenant mentioned in section 55 of the Transfer of Property Act would be applicable. The fact that the implied contract is not put into the document itself will not make any difference. A contract may be express or implied (see section 9 of

the Contract Act). In article 116 of the Limitation Act, the word used is "contract." This should include an implied contract also. We have to mention this aspect of the case because we have said that if the vendees from Kauleshar Rai and his brothers could not succeed on the express contract contained in the sale-deed of 1912, they were entitled to succeed on the implied covenant which runs with the land.

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In *Nabin Chandra Ganguly v. Munshi Mander* (1), it was held that the implied contract mentioned in section 108 of the Transfer of Property Act (the case was of a lease) could be read within article 116 of the Limitation Act and a suit for compensation for breach of the covenant would be governed by the six years' rule of limitation. The same view was taken in *Sigamani Pandithan v. Munibadra Nainar* (2), following earlier Madras cases. The same view was taken in *Ganapa Putta Hegde v. Hammad Saiba* (3) and in *Injad Ali v. Mohini Chandra Adhikari* (4). In the case of *Tricomdas Cooverji Bhoja v. Gopinath Jiu Thakur* (5), the question arose whether, where rent was payable under a registered document, article 110 which applied expressly to a suit for recovery of arrears of rent applied or article 116 with the larger period of limitation. Their Lordships of the Privy Council held that article 116 applied to all cases in which the contract was in writing registered, although such cases may have been provided for in the earlier portion of the first schedule of the Limitation Act. This makes it entirely clear that a suit for compensation for breach of a contract that is in writing registered must be brought within article 116.

We are entirely satisfied both on principle and on authority that the suit is within time. The result is that the appeal fails and is hereby dismissed with costs.

(1) (1927) I. L. R., 6 Pat., 606. (2) [1926] A. I. R., (Mad.), 255.

(3) (1925) I. L. R., 49 Bom., 596. (4) [1924] A. I. R., (Cal.), 148.

(5) (1916) I. L. R., 44 Cal., 759.



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January, 24.

*Before Mr. Justice Sulaiman and Mr. Justice Kendall.*

JAMNA PRASAD (DEFENDANT) v. MUHAMMAD ZAHIR-  
UDDIN (PLAINTIFF).\*

*Act (Local) No. XI of 1922, (Agra Pre-emption Act), sections 4(3), 11, 12—Sale of an isolated plot—Pre-emptible by a co-sharer in the mahal—Sale of a site of a building not exempted from the operation of the Act.*

A right of pre-emption accrues in favour of co-sharers in the mahal even when a petty proprietary interest is transferred.

Land covered by buildings is not exempt from the operation of the Act and is liable to be pre-empted.

Pandit *Uma Shankar Bajpai*, for the appellant.

Mr. K. O. Carleton, Mr. S. Mohammad Husain and Maulvi *Mushtaq Ahmad*, for the respondents.

SULAIMAN and KENDALL, JJ. :—Three points have been urged in this appeal. The first is that an isolated plot of land is not pre-emptible under the Act. We are unable to accept this contention. Under sections 11 and 12 a right of pre-emption accrues in favour of the co-sharers in the mahal even when a petty proprietary interest is transferred.

The second point is that the land covered by such buildings is exempted from the operation of the Act. This contention also cannot be accepted. Section 4, sub-clause (3) makes the Act applicable to land, which includes things attached to the earth or permanently fastened to anything attached to the earth, when sold or foreclosed along with the land to which they are attached. This, in our opinion, includes buildings which are attached to the earth. We may in this connection point out that the expression "attached to the earth" has

\* Second Appeal No. 1262 of 1926, from a decree of D. L. Johnston, District Judge of Filibhit, dated the 20th of March, 1926, confirming a decree of Lal Bhagwati Dayal Singh, Munsif of Filibhit, dated the 9th of December, 1925.

been defined in section 3 of the Transfer of Property Act as meaning rooted in the earth or embedded in the earth as in the case of walls or buildings. There is no reason to suppose that that expression in this Act has a different meaning. It is by virtue of such a definition that house property is treated as immoveable property under the Transfer of Property Act and also under the General Clauses Act, vide *Abdul Khan v. Shakira Bibi* (1).

[The rest of the judgment is not material for the purposes of the report].

*Appeal dismissed.*

*Before Mr. Justice Banerji and Mr. Justice King.*

MANGALI PRASAD AND ANOTHER (PLAINTIFFS) *v.* BABU RAM AND OTHERS (DEFENDANTS).\*

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*Award purporting to partition property—Signed by parties—Registration—Admissibility in evidence—Relinquishment of right of redemption by Hindu father—Without legal necessity and benefit to the family—Not binding on his sons.*

An award does not require registration merely because it is signed by the parties to the reference and purports to partition the property.

Where a Hindu father relinquished his right of redemption without any legal necessity or benefit to the family, the relinquishment was not binding on the sons.

*Tek Lal Singh v. Sripati Chowdhury* (2), referred to, *Wazir Ali v. Mahbub Ali* (3), followed.

Pandit *Uma Shankar Bajpai*, for the appellants.

Munshi *Narain Prasad Asthana*, for the respondents.

BANERJI and KING, JJ. :—This appeal arises out of a suit for possession of one-third share of a house. The

\* Second Appeal No. 255 of 1926, from a decree of Farid-ud-din Ahmad Khan, Subordinate Judge of Mainpuri, dated the 5th of November, 1926, reversing a decree of Lachman Prasad, Munsif of Mainpuri, dated the 3rd of September, 1924.

(1) (1927) I. L. R., 50 All., 348. (2) (1913) 20 Indian Cases, 860.

(3) (1914) 22 Indian Cases, 412.



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house originally belonged to Mulu and on his death his three sons, Narpat, Ram Sahai and Alkhi became joint owners of one-third share each. Narpat mortgaged his one-third share in 1901 to his brother Ram Sahai for Rs. 150 with possession. The plaintiffs are the son and grandson of Narpat. They allege that they redeemed the mortgage in 1922 by payment of the mortgage money to Anokhey Lal, son of Ram Sahai. They alleged that in spite of the redemption Anokhey Lal and defendants Nos. 2 to 4, who are the sons of Alkhi, refused to allow the plaintiffs to take possession; hence the suit.

The defence set up by defendants Nos. 2 to 4 was that in 1909 there was a partition of the house between the three brothers. The partition was in accordance with an arbitration award. According to the terms of the award Narpat relinquished his one-third share in the house in consideration of release from liability to pay the mortgage money, and the two brothers Ram Sahai and Alkhi were allotted a half share each in the house. It is pleaded, therefore, that Narpat surrendered his equity of redemption and the plaintiffs had no right to make the so-called "redemption" in 1922 and are not entitled to recover possession of Narpat's share.

The plaintiffs contend that they are not bound by the award of the arbitrators since they were no parties to it. Their father signed the award but his action is not binding upon them since it amounted to a relinquishment of his interests without legal necessity and without any benefit to the family. It was also pleaded that the arbitration award was inadmissible in evidence for want of registration.

The court of first instance repelled the pleas raised in defence and decreed the plaintiffs' claim. The lower appellate court took the view that the arbitration award was valid and binding upon the plaintiffs and therefore dismissed their claim *in toto*.

Three principal points are raised by the learned advocate for the appellants.

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The first point is that the award is inadmissible in evidence for want of registration since it amounts to a deed of partition. He relies upon the ruling of the Calcutta High Court in *Tek Lal Singh v. Sripati Chowdhury* (1). In that ruling it was observed that a document which purports to be an award may amount to something more than an award. If the parties to the reference affix their signatures to the award in token of their acceptance of the decision of the arbitrators the award may become thereupon a deed of partition and may as such become compulsorily registrable. These observations, however, were *obiter dicta*. The court held that the document in question was an award, and as such was not compulsorily registrable.

On the other side we have been referred to a decision of the Punjab Chief Court in the case of *Wazir Ali v. Mahbub Ali* (2) which case is very much on all fours with the case before us. In that case also some brothers divided the family property between them and appointed arbitrators to carry out the partition. The award was signed not only by the arbitrators but also by the four brothers. It was contended in that case also that the award was inadmissible for want of registration as it amounted to a deed of partition. It was held that the document signed by arbitrators as their award does not cease to be an award merely because the settlement was arrived at by the parties and was also signed by them. As an award it did not require registration. In our opinion the reasoning of the learned Judges who decided this case was sound and we agree with the view that an award does not require registration merely because it is signed by the parties to the reference and purports to

(1) (1913) 20 Indian Cases, 860.

(2) (1914) 22 Indian Cases, 412.

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partition the property. The award is therefore admissible in evidence.

The next contention is that the sons, namely, the plaintiffs, are not bound by their father's acceptance of this award. On this point we are in agreement with the learned advocate for the appellants. In the first place, it is clear that there was no substantial consideration for Narpatt's relinquishment of his interests in the family property. He was not under any personal liability to pay the mortgage money as the mortgage was with possession. He gained nothing by relinquishment of his right of redemption and such relinquishment must be regarded as without consideration.

In the next place, it is clear that the relinquishment was not made for legal necessity or for the benefit of the family and in that view of the case also it is not binding on the sons.

The next point raised is that in any case the plaintiffs' suit should have been decreed as against Anokhey, defendant No. 1, since he had admitted the alleged redemption of the mortgage in 1922 by receipt of the mortgage money. Here again we agree with the contention of the appellants. Anokhey Lal is the son of the original mortgagee and he is admittedly in possession of half the house in dispute. He admits that the plaintiffs have not lost their right of redemption by reason of the family partition in 1909 and that they have in fact redeemed the mortgage by payment of the mortgage money to him. We see no reason whatever why their claim for one-third of the house should not be decreed as against Anokhey Lal. His father accepted liability for the plaintiffs' mortgaged share by receiving Rs. 75 (half the mortgage money) from Alkhi at the time of the partition in 1909, and Anokhey Lal admittedly received the whole of the mortgage money from the plaintiffs in 1922.

The plaintiffs are therefore entitled to recover possession of the one-third share out of the half share which is in the possession of Anokhey Lal..

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We accordingly allow the appeal as against Anokhey Lal and decree the plaintiffs' suit for possession of one-third share in the house as against Anokhey Lal only. The appeal as against the other defendants is dismissed with costs throughout. Anokhey Lal never contested the suit or appeals, so no costs are awarded against him.

### REVISIONAL CRIMINAL.

*Before Mr. Justice Boys and Mr. Justice Sen.*

EMPEROR v. RAM LAL AND ANOTHER.\*

*Criminal Procedure Code, section 110—Notice—Evidence of general repute—Admissibility of suspicions—Admissibility of previous convictions and the evidential value thereof—Reference—Procedure.*

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January, 28.

In proceedings under section 110 of the Criminal Procedure Code each man proceeded against is entitled to a separate notice and not to have the charges which are going to be made against him confused with the charges that are being made against somebody else.

The suspicion of a witness that the accused person committed a particular theft is wholly inadmissible. A witness can not say what he suspects. He can depose to facts within his knowledge, and it will be for the magistrate to determine whether those facts alone or with other evidence create such a conviction in his mind as to justify calling for security.

Evidence of general repute does not mean the placing of a heterogeneous mass of more or less general statements by any witness who can be produced to say something on hearsay or otherwise and label it "general repute". A man's general repute is just as much a fact as any other fact which can be

\* Criminal Reference No. 897 of 1928.

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proved by a witness, and the witness should be asked questions to show that he is in a position to know what the general reputation of the accused is, and as to when and in what circumstances he has heard the character of the accused discussed.

The existence of previous convictions of offences such as theft is a matter which may and should be taken into consideration as indicating the character and disposition of the accused. At the same time weight must be given to a consideration of the period that has elapsed subsequent to the last conviction in order to see whether the accused has since shown a disposition to conduct himself properly.

Proper procedure for making a Reference to the High Court pointed out.

The Assistant Government Advocate (Dr. M. Wali-ullah), for the Crown.

The opposite parties were not represented.

BOYS and SEN, JJ. :—This is described as a reference by the Sessions Judge of Shahjahanpur.

It appears that the police secured the institution of proceedings under section 110 of the Code of Criminal Procedure against two persons Roshan and Ramlal. The police desired that these two men should be bound down for a period of three years each. The case was heard at the usual great length which is one of the unfortunate characteristics of this type of case, and the Magistrate eventually discharged Ramlal and bound down Roshan for a period of only one year. This did not satisfy the police, and the Prosecuting Inspector approached the District Magistrate with a number of written criticisms of the order of the Trial Magistrate and concluded his notes as follows : "It is therefore requested that a High Court may kindly be moved to enhance the term of one year's notice of Roshan to three years and to order the re-trial of Ramlal under section 437 of the Code of

Criminal Procedure." The typewritten copy, which is all that can be traced in this Court, is undated and shows that the signature to the document is illegible.

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Whether this document was ever perused by the District Magistrate or not, we are unable to say. The next proceeding that we have before us is a letter purporting to be from the District Magistrate to the Registrar of this Court, through the Sessions Judge of Shahjahanpur, which purports to be signed on behalf of the District Magistrate by a Deputy Magistrate, apparently Pandit Anirudh Kishan Sharma, and to it was attached the note of the Prosecuting Inspector.

This letter, together with the note, reached the Sessions Judge, Mr. Ardagh. Whether there was any hearing of the case before Mr. Ardagh we cannot say; but he passed an order on the 1st of November, 1928, which begins: "In this case the District Magistrate recommends that the period for which security is demanded from Roshan be increased to three years and that security be demanded from Ramlal for one year. I have been through the file." This suggests that the learned Judge examined the file for himself, but did not have it argued before him. His order, which is a very brief one, concludes: "As regards the case of Roshan from whom security was demanded for a year there appears to be no necessity to approach the Honourable High Court through the Local Government. No appeal has been presented on behalf of Roshan, and the period of appeal has expired." In an earlier portion of the judgment he had said: "I consider that the prosecution evidence against both the accused is un rebutted, and that security should have been demanded from both", and as to Roshan "security should have been demanded for a longer period." In another place, on the back of the letter from the District Magistrate to the Registrar of



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this Court, which has been signed on behalf of the District Magistrate by Mr. Sharma, Deputy Magistrate, the learned Judge endorsed: "Forwarded to the Registrar, High Court of Judicature at Allahabad, for orders of the Honourable Court." In fact this last action is all that was called for on the part of the Sessions Judge in the case of a reference by the District Magistrate. In this manner the case has come before us. It would seem that neither the District Magistrate nor the Deputy Magistrate nor the Sessions Judge has appreciated the proper course to adopt. We will deal with these documents seriatim in order to facilitate an appreciation of what we have to say.

First, as to the order of Mr. Abdul Jalil, the Sub-Divisional Magistrate of Pawaia, dated the 4th of September, 1928, the order which we are asked to consider and to hold to have been mistaken, we would commence by expressing our high appreciation of the obvious care and patience which he gave to a mass of confused evidence, and anything that we may say in reference to mistakes made by him must not be understood to detract from that appreciation.

The notice that was issued to the two men was a notice to them jointly, and this we consider was undesirable. Each man is entitled to a separate notice and not to have the charges which are going to be made against him confused with the charges that are being made against somebody else. There are no less than ten paragraphs in this notice, which is the order under section 112 of the Code of Criminal Procedure. We think that the Magistrate has correctly described it as in substance an order directed to Ramlal to show cause why he should not be called upon to give security in the sum of Rs. 100 with two sureties of Rs. 100 each, for a period of three years on the ground that he was "by habit a

house-breaker and thief", and this charge is one which comes under clause (a) of section 110.

Roshan was directed similarly to show cause why he should not furnish security on similar terms in respect of the charge that he was by habit a house-breaker and thief. But in his case there was also a further charge under clause (f) of section 110 that he was so desperate and dangerous as to render his being at large without security hazardous to the community.

These were the charges which the two men had to meet and nothing that was not relevant to those charges was relevant to the case at all. We have read and analysed with care the judgement of the Magistrate, the note of the Prosecuting Inspector, the forwarding note of the Deputy Magistrate on behalf of the District Magistrate, and the remarks of the Judge, and we do not propose to deal in detail with the various comments. A case of this description can, so far as it comes before us owing to the dissatisfaction of the District Magistrate only, come before us on the revisional side. It is not an appeal, and in accordance with the usual practice of this Court, which has been frequently stated, we decline to go into the merits of a case on the revisional side unless there is something to show us that there had been a material departure from the legal principles according to which the case ought to have been dealt with; or, if we are asked to go into the facts, we will only do so if something is shown to us which particularly indicates that it is desirable to enter into those facts. The principle on which the court acts has so often been enunciated that it is not necessary and should not be necessary to repeat them further than this. These remarks apply in their entirety to the case of Roshan, though possibly with a little less force to the case of Ramlal, where we have been asked to set aside the order

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of discharge and to direct a further inquiry. We have, then, examined the evidence so far as was necessary to enable us to see whether the Trial Magistrate had approached the case in the proper way and had exercised a judicial discretion in reference to the weight of the evidence. There are only two points in regard to which we think the Magistrate was in error. He had before him in the case of Roshan a number of previous convictions. His view of the value as evidence of those previous convictions is possibly sound, but it has not been expressed quite as clearly as it might have been, and has therefore given the prosecution an opportunity of taking exception. We have no hesitation in saying that the existence of a number of previous convictions of offences such as theft is a matter which may and should be taken into consideration as indicating the character and disposition of the accused. But the Magistrate is quite right in saying that the existence of such convictions is not by itself sufficient to justify ordering the accused to furnish security. Weight must be given to a consideration of the period that elapsed subsequent to the last of the convictions in order to see whether during that period the accused has apparently shown a disposition to conduct himself properly or whether there are indications that he has during that period continued in his previous course, though he may not have actually brought himself within the clutches of the law. It is from this aspect that we have ourselves considered the nature of the convictions and the evidence as to the conduct and reputation of the accused subsequent to the last conviction. The only other point which we find open to criticism is one in which the Magistrate, in our view, erred in favour of the prosecution. A mass of evidence was led to show that this person or the other had "suspected" the accused to be guilty of this or that theft. The Magistrate has weighed the value of this evidence. He need not have

done so, for it has no value whatever. Time after time this Court has pointed out that the suspicion of a witness that a particular man committed, either singly or with others, a theft in his house is wholly inadmissible. In this respect it should be clearly realized that a police officer stands in no stronger position than any other witness.

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Having considered the whole case at considerable length we have no hesitation in declining to interfere with the order of the Magistrate.

But we cannot leave the case here. The amount of time of the court that is wasted in cases of this nature by the admission of a mass of inadmissible evidence, and the amount of time that is consequently also wasted in efforts by the superior courts to eliminate that evidence approaches to a scandal. In most cases if one were to go through the whole record scoring out the passages that should never have found a place there, it is probable that not ten per cent. of the evidence would remain. It does not, of course, follow that that remaining ten per cent. is not good and sufficient evidence. We do not suggest that it is wholly the fault of Magistrates. It is very difficult for them in the press of their work to check each statement as it is made by a witness. But it is part of the duty of the Magistrate to see that inadmissible evidence is not admitted on to the record. We think that the Magistrate, in cases of this description where inadmissible evidence may so easily find entry, might well ask the prosecution, as each witness is put into the witness-box, to what point the witness' evidence is to be directed. He will then know exactly what to expect and be in a position to refuse promptly to record statements that are not admissible.

There are only two kinds of evidence which are properly admissible. Ordinarily speaking the case will

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be governed by exactly the same rules of evidence as govern any other cases. A witness cannot say what he suspects. If the prosecution know that the witness does suspect the accused of having taken part in a theft, the prosecution can question that witness before he is put into the witness-box and ask him what are his reasons for suspecting the accused. They can themselves ascertain from the witness what *facts* are within his knowledge, and then put him into the witness-box to give evidence as to those facts, and it will be for the Magistrate to determine whether those facts alone or supported by other evidence create such a conviction in his mind as to justify calling for security. But a witness' "suspicions" and his "allegations" that the accused is a thief, etc., are worth nothing and should not be admitted. The Legislature has further provided that evidence may be given of the general repute of the accused. This does not mean that the prosecution may place before the Magistrate a heterogeneous mass of more or less vague and general statements by any witness who can be produced to say something on hearsay or otherwise, label it "general repute" and ask the Magistrate to call for security on the strength of it. Yet this is undoubtedly a very general practice. A man's general repute, whether deserved or not, is just as much a fact as any other fact which can be proved by a witness. If the witness is a witness to "general repute" he may say: "The accused has the general reputation of being a man who habitually commits such and such offences." In addition to this the witness may properly be put a few questions by the prosecution to show that he himself is in a position to know what the general reputation of the accused is. Further than this, on the mere question of "general repute," it is unnecessary and generally undesirable to go in examination-in-chief. If the accused is defended, his counsel, if he sees fit, can ask any questions

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that may go to show whether the witness is really telling the truth when he says that the accused's "general repute" is so and so. He may question him if he thinks fit as to when and under what circumstances he has heard the character of the accused discussed. He may, in fact, test the credibility of the witness as to the real existence of the alleged general reputation in any such legitimate way. The Magistrate is, of course, at liberty to ask similar questions; and where the accused is not defended, or the Magistrate is not himself satisfied with the cross-examination, he should satisfy himself by asking such questions as may seem desirable. It is impossible and we do not desire to lay down the exact course which such examination may take, but we do desire to make it clear that the mere production of a string of witnesses who say that an accused person's general repute is so and so, can carry very little weight unless some attempt has been made to show that he is a person in a position to know the general repute, and there has been some reasonable attempt by the counsel for the accused or by the court to check the value of the evidence.

Before concluding we must draw attention to the impropriety of the District Magistrate, or the Deputy Magistrate, Mr. Anirudh Kishun Sharma, acting on his behalf, in forwarding to the Sessions Judge or to this Court the notes of the Prosecuting Inspector. Those notes may be of some value or of little value as the case may be for the purpose of instructing the Government Pleader who may have to support the views of the District Magistrate at a later stage, but they are not material which ought to be placed before the court. The District Magistrate should have examined those notes for himself, and if there was any portion of them that contained material which he thought to be of value he should have embodied that material in his own order. In the present case he appears to have accepted *en bloc*

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the Prosecuting Inspector's criticisms and has simply attached them to his letter. Apart from the general impropriety of this course, in this particular case it was still more gravely improper. The Prosecuting Inspector had used language about the Trial Magistrate which was most unbecoming and improper. If the District Magistrate did not consider it part of his duty to reprove the Prosecuting Inspector for that language and saw nothing unfitting in a Prosecuting Inspector using such language about a Magistrate, that is possibly his concern. But he was very seriously wanting in a sense of what is proper in permitting a document containing that language to be forwarded to the Sessions Court or to this Court. We have no hesitation in recording our opinion that the Prosecuting Inspector ought not to have been guilty of the use of such language in regard to any Magistrate.

The result of our examination of the record is that we see no reason to interfere and reject the reference.

### REVISIONAL CIVIL.

*Before Mr. Justice Dalal.*

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 January, 31.

HUKUM SINGH (PLAINTIFF) v. SURAJPAL SINGH AND ANOTHER (DEFENDANTS).\*

*Civil Procedure Code, section 152—Amendment of judgement and decree on ground of accidental slip in judgement of predecessor in office.*

Under the provisions of section 152 of the Civil Procedure Code it is open to a court to correct the errors arising in the judgement and the decree from an accidental slip in the judgement; and this can be done by a successor in office of the judge who passed the judgement and decree in question. *Surta v. Ganga* (1), *Shahab Din v. Siraj-ud-din* (2), and *Lakshman Iyengar v. Narayana Iyengar* (3), distinguished.

\*Civil Revision No. 10 of 1928.

(1) (1885) I. L. R., 7 All., 411; 875. (2) (1912) 17 Indian Cases, 418.

(3) [1924] A. I. R., (Mad.), 225

Munshi *Binod Bihari Lal*, for the applicant.

Munshi *Narain Prasad Asthana*, for the opposite parties.

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DALAL, J.:—The learned Judge of Agra, Mr. Bennet, amended a judgement and decree of his predecessor in office Mr. Herchenroder on the ground of an accidental slip. A decree-holder failed in the execution court to obtain sale of certain trees and materials of a house of a judgement-debtor. The judgement-debtor was a tenant and the trees grew on his holding and he was a licensee of the house. The decree-holder thereupon brought a declaratory suit that the trees and the materials of the house were saleable in execution of his decree. The suit was decreed with respect to both the trees and the materials by the trial court of the Munsif of Agra. An appeal was taken to the court of the District Judge and Mr. Herchenroder, Additional District Judge, decided it. In the operative part of the order he appears to have made the mistake of transposing the words "materials of the house" and "trees". His judgement shows that he held the materials of the house liable to sale but not the trees, and so his intention was to decree the suit as to materials and dismiss it as to trees. By some slip the words were transposed. Mr. Herchenroder left the district and there was no successor to him as Additional District Judge. The successor to the office was Mr. Bennet, the District Judge. A petition was presented to Mr. Bennet by the defendants zamindars under section 152 of the Code of Civil Procedure, desiring both the judgement and the decree to be amended for reasons already stated by me. A notice was issued to the plaintiff decree-holder, Hukum Singh. He made no appearance and the judgement and the decree were corrected as desired by the defendants zamindars.



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It is argued here that Mr. Bennet had no jurisdiction to make the correction. In my opinion, he had. I remember a second appeal in Oudh where under similar circumstances I corrected both the judgement and the decree of a learned brother of mine, who had by a slip written the word "decreed" in place of "dismissed." My learned brother had then left the court of the Judicial Commissioner and was in England, as was the case here. The provisions of section 152 are wider than the provisions of section 206 of the Code of 1882. The provisions of section 206 gave the court power only to amend the decree if it was found to be at variance with the judgement. Under the provisions of that section no power was given to the court to correct any accidental slip in the judgement. The provisions of section 152 are very wide and give power to the court not only to correct clerical or arithmetical mistakes in judgements, decrees or orders, but also errors arising therein from any accidental slip or omission. This may be done at any time by the court, even without any application by any of the parties. The aim of the present Code of Civil Procedure is to give a court the widest powers possible to pass orders for the ends of justice at any time and in any situation. Reference as to rulings passed prior to 1908 can therefore be of no help. The rulings quoted by learned counsel for the applicant were : *Surta v. Ganga* (1), with the Full Bench judgement at page 875, and *Sahab Din v. Siraj-ud-din* (Punjab Chief Court) (2). These rulings are no longer applicable. A ruling of the Madras High Court in the case of *Lakshman Iyengar v. Narayana Iyengar* (3), was quoted. The matter was decided there on a very technical ground—that the application was only for the amendment of the decree and not for the amendment of the judgement, and the decree,

(1) (1885) I. L. R., 7 All., 411; 875. (2) (1912) 17 Indian Cases, 418.

(3) [1924] A. I. R.; (Mad.), 225

when it agreed with the judgement, could not be corrected under section 152. The court, however, gave the indulgence of having the same application treated as an application for review. Obviously the court's attention was not drawn to a simpler method of treating the application as an application for the correction of the judgement as well as for the correction of the decree. I have read the judgement of Mr. Herchenroder and agree with Mr. Bennet that Mr. Herchenroder has made a slip and the correction was necessary for the ends of justice.

This application is dismissed with costs.

### PRIVY COUNCIL.

ABDUL JALIL KHAN AND OTHERS (PLAINTIFFS) *v.* OBAID-ULLAH KHAN AND OTHERS (DEFENDANTS).

[On appeal from the High Court at Allahabad.]

*Civil Procedure Code, section 66—Sale in execution—Benami purchase—Real purchaser obtaining title by adverse possession—Dispossession by transferee from benamidar—Indian Limitation Act (IX of 1908), section 28 article 144.*

If after an auction sale of immovable property in execution of a decree the real purchaser has for twelve years possession adverse to the certified purchaser (his *benamidar*) and is then dispossessed by a transferee of the certified purchaser, he can sue for possession on the title acquired by him under the Indian Limitation Act, 1908, section 28 and article 144, and need not aver or prove that the auction purchase was made for him; section 66 of the Code of Civil Procedure, 1908, therefore, does not apply in that case.

Decree of the High Court, I. L. R., 43 All., 416; varied; it was unnecessary to decide whether the High Court had rightly held that in the case of a sale and transfer before 1909

\*Present: Lord BLANESBURGH, Lord DARLING, Lord TOMLIN, JOHN WALLIS and Sir GEORGE LOWNDES.

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1929 section 66 of the Code of 1908, and not section 317 of the Code of 1882, applied.

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APPEAL (No. 82 of 1924) from a decree of the High Court (January 15, 1920) which affirmed, so far as is material to the subject-matter of this report, a decree of the Additional Subordinate Judge of Aligarh.

The suit related to immovable properties which, having been sold in execution of decrees, were transferred in 1900 by the certified purchasers to the first respondent Obaid-Ullah. Both courts in India found that Abdul Shakur and Abdul Latif, whose heirs were the appellants, were the true purchasers, who obtained possession upon the sales, and that they and the appellants after them had been in physical possession until 1915. In 1909 Abdul Ghafur had executed a deed of *waqfnama* of all his property, including his share of properties bought at the sales.

The suit was brought by the appellants on the 5th of August, 1916. They prayed by their plaint for a declaration that they were owners in possession of the properties; alternatively, if it were found that the first respondent was in possession, for an order for possession; they alleged that they were the true purchasers, also that any right or title which the first respondent had was extinguished by adverse possession. They also alleged that the *waqfnama*, of which Obaid-Ullah had been appointed *mutwalli*, was inoperative.

The material facts appear from the judgement of the Judicial Committee.

The Subordinate Judge held that so far as the suit related to properties transferred by the certified purchasers it was barred by section 66 of the Code of Civil Procedure; but that the *waqfnama* had never been brought into operation, and that the plaintiffs were entitled to recover the properties included in it, except

those purchased at the auction sale. He decreed accordingly.

On an appeal and cross-objection the High Court dismissed the suit altogether. The learned Judges (MEARS, C. J. and KNOX, J.) affirmed the view that so far as the suit related to properties transferred by the certified purchaser it was barred by section 66 of the Code of 1908; they rejected a contention that section 317 of the Code of 1882, and not section 66 of 1908, applied. With regard to the *waqfnamā* they held that the intention having been to create a genuine dedication the subsequent conduct of Obaid-Ullah did not invalidate it.

1929. April 16, 18. *Dunne, K. C. and Wallach*, for the appellants:—The sale and transfer were both before 1909, consequently the Code of Civil Procedure, 1908, section 66 did not apply, as it is not retrospective in effect: *Promatha Nath Pal v. Mohini Mohan Pal* (1). Section 317 of the Act of 1882 which was in operation did not in terms apply to a suit against a transferee from a certified purchaser. The High Court at Allahabad in *Sibta Kunwar v. Bhagoli* (2) rightly held that section 317 did not so apply by implication; the High Courts at Calcutta and Madras have also so held, though in Bombay it was held to the contrary. Section 66 should not be given a retrospective effect which takes away a right of action existing when it was passed; that is so, even if the section deals with a matter of procedure: *Colonial Sugar Refining Co. v. Irving* (3). Further, the plaintiffs pleaded alternatively that they had a title by adverse possession, and it was concurrently found that they were in possession from the date of the sale until 1915. They therefore had a title by adverse possession, and it was concurrently found that they were in possession from the date of the sale unit 1915. They therefore had a

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(1) (1929) I.L.R., 47 Cal., 1108. (2) (1909) I.L.R., 21 All., 196.

(3) [1905] A.C., 369.

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title under the Indian Limitation Act, section 28 and article 144 and an alternative cause of action to which section 66 of the Code did not apply.

*DeGruyther*, K. C. and *E. B. Raikes*, for the first respondent :—There is no ground for holding that section 66 of the Code of 1908 does not apply to every suit brought after that Code came into force by a person claiming to have purchased *benami*. Even if the Code of 1882 applied, the High Court at Bombay rightly held in *Hari Govind v. Ramchandra* (1) that section 317 applied to a suit against a transferee from a certified purchaser. The title by limitation was not put forward in the High Court, nor in the appellants' reasons upon the present appeal. There was no finding that the plaintiffs' possession was adverse; it may equally have been by the consent of the certified purchaser.

*Dunne*, K. C., replied.

June, 17. The judgment of their Lordships was delivered by Sir JOHN WALLIS :—

The parties to this suit are members of a Muham-madan family, and the plaintiffs sue to establish their rights as heirs of Abdul Shakur and Abdul Latif to certain properties in the villages of Chakathal and Kakathal, which are in possession of Obaid-Ullah, the first defendant.

The deceased Abdul Shakur was the youngest of four brothers, Abdul Latif was the son of the eldest brother and Obaid-Ullah is the son of a younger brother. The second and third defendants are widows who have been made parties as being among the heirs of Abdul Latif. The present appeal relates only to certain properties in the aforesaid villages, which were purchased at court auctions in execution of decrees by Mahmud Ali on the

(1) (1906) I.L.R., 31 Bom., 61.

20th of April, 1885, and by Sirajul Haq on the 21st of March, 1892. On the 7th and 8th of July, 1900, Sirajul Haq and Mahmud Ali executed sale-deeds of these properties in favour of Obaid-Ullah, the first defendant.

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The plaintiffs' case is that the purchases at the court auctions and the subsequent transfers were made *benami* for Abdul Shakur and Abdul Latif, who had provided the purchase money.

The plaintiffs further alleged that Abdul Latif, who died in 1909, and Abdul Shakur, who died in 1915, and the plaintiffs after them, had been in proprietary possession of these properties ever since the date of the court auctions, and that by virtue of their possession for more than twelve years the plaintiffs had become absolute owners in possession of the properties in question.

It was admitted in the plaint that Abdul Latif, in April, 1909, some months before his death had executed a *wagfnama* of all his properties, but it was alleged that this *wagfnama* was a mere paper transaction, and was not binding on the plaintiffs.

The plaint also alleged that after the deaths of Abdul Latif and Abdul Shakur, the first defendant, in September, 1915, instituted suits for arrears of rent against tenants of the properties, and in May, 1916, instituted a suit for profits, which jeopardised the plaintiffs' rights, and made it necessary to institute the present suit.

They accordingly prayed for a declaration that they were the actual owners in possession of the suit properties, and for an injunction against the first defendant. The plaint was subsequently amended by including a prayer for possession in case the court should be of opinion that the plaintiffs were not in possession.

The first defendant pleaded that as regards the properties purchased at court auctions in the name of Sirajul

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Haq and Mahmud Ali, the suit was barred by section 66 of the Civil Procedure Code of 1908. He denied that the auction purchase was *benami*, and alleged that he and his transferors had all along been in possession. As regards the *waqf* created by Abdul Latif, the first defendant admitted the execution of the deed of *waqf*, and that he had attested it, and alleged that after the death of Abdul Latif he had been duly appointed *mutwalli* or trustee of the *waqf*, but he alleged that he was then unaware that the *waqf* deed included properties of his own which had been purchased by Sirajul Haq and Mahmud Ali at the court auctions, and subsequently transferred to him. He further pleaded that the plaintiffs were not entitled to sue in respect of the properties owned by the *waqf* unless the deed of *waqf* was cancelled. The second and third defendants filed written statements in which they challenged the validity of the *waqf* and prayed that their interest as heirs of Abdul Latif should be protected.

The issues material to this appeal were as follows :—

- (3) Whether the plaintiffs are in possession?
- (4) Whether the claim is time-barred.
- (5) Whether the plaintiffs by adverse possession extending over twelve years have become the proprietors of the properties in suit?
- (6) Whether section 66 of the Civil Procedure Code bars the suit?
- (7) Whether purchases and acquisitions made by Sirajul Haq and Mahmud Ali Khan were really made by Abdul Latif Khan and Abdul Shakur Khan?
- (8) Whether the sales in favour of the defendant No. 1 were fictitious and the transactions were *benami* for Abdul Latif and Abdul Shakur?

- (11) Whether the *waqf*nama executed by Abdul  
Latif was a genuine transaction or was it  
only a nominal one?

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As regards issues (3) and (4) the Subordinate Judge, whose findings of fact were accepted by the High Court, found that plaintiffs were not in possession at the date of suit, but that they and those through whom they claimed had been in possession, "physical possession at any rate," down to the death of Abdul Shakur in 1915.

On the 6th, 7th and 8th issues, he found that the purchases and acquisitions made by Sirajul Haq and Mahmud Ali were really made by Abdul Latif and Abdul Shakur and that the sales by Sirajul Haq and Mahmud Ali to the first defendant were also *benami* for Abdul Latif and Abdul Shakur, but as regards the properties covered by the auction purchases he held the suit was barred by section 66 of the Civil Procedure Code.

As regards the 5th issue the Subordinate Judge disposed of it by observing "the plaintiffs have pleaded in the alternative that if they had no title initially they acquired one by adverse possession. The finding of the court being that in respect of the bulk of the property the owners were Shakur and Latif, no question of gain of proprietary title by adverse possession arises."

The Subordinate Judge also held that the *waqf* created by Abdul Latif was a good and valid one, but that this was not a sufficient ground for refusing to give possession to the rightful heirs of the founder as the first defendant had taken possession of the *waqf* properties not as a duly appointed *mutwalli*, but as a mere trespasser.

In the result he decreed the suit except as to the properties which had been purchased *benami* at the court auctions, and directed that as regards any questions aris-



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ing between the heirs of Abdul Shakur and Abdul Latif the parties should be referred to a separate suit.

The plaintiffs appealed to the High Court and the first defendant filed cross-objections.

The High Court agreed with the findings of fact of the Subordinate Judge and approved of his reasons for holding that the suit was barred as regards the properties covered by the auction purchases. They held, however, that he was wrong in giving the plaintiffs a decree in respect of properties which were included in the *waqf* created by Abdul Latif, as the gift of those properties to the *waqf* had been duly perfected by Abdul Latif in accordance with the requirements of Muhammadan law, and as, after his death, the first defendant had been duly appointed *mutwalli* of the *waqf*.

They therefore dismissed the plaintiffs' appeal and allowed the first defendant's cross-objections as to the *waqf* properties.

As regards the properties which, according to the findings, were purchased at court auctions by Sirajul Haq and Mahmud Ali *benami* for Abdul Shakur and Abdul Latif, and were subsequently transferred to the first defendant, Obaid-Ullah *benami* for them, both the lower courts were of opinion that the suit was barred under section 66 of the Civil Procedure Code of 1908 on the ground that it was a suit against a "person claiming title under a purchase certified by the court . . . on the ground that the purchase was made on behalf of the plaintiff or on behalf of someone through whom the plaintiff claims." The present section says that "no suit shall be maintained against any person claiming title under a purchase certified by the court," whereas the wording of the corresponding section 317 of the Code of 1882 was "no suit shall be maintained against the certified purchaser," and the alteration was admittedly made

because it had been held by the Calcutta, Madras and Allahabad Courts that the section only prohibited suits of this nature instituted against the certified purchaser himself and did not prohibit them when instituted against transferees from him, whereas in Bombay it was held that it did. In these circumstances, it has been held in Calcutta that the provisions of section 66 of the present Code in so far as they prohibit suits on the ground specified in the section, do not apply to suits against transferees from *benamidars* made when section 317 of the Code of 1882 was in force, and it has been contended before their Lordships on the authority of that decision that the lower courts were wrong in applying the provisions of section 66 of the Code of 1908 to the present case.

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Their Lordships do not propose to deal with this question, because, in their opinion, assuming the courts to have been right in holding that the case must be dealt with under the provisions of section 66 of the present Code, they are of opinion that the plaintiffs are entitled to succeed on their alternative cause of action, which is the subject of the 5th issue, viz., their dispossession by the first defendant after they had been in possession for more than twelve years, a contention very briefly dealt with by the Subordinate Judge and not mentioned by the High Court, though it was one of the grounds of appeal and was taken again in the application for leave to appeal to His Majesty in Council.

In dealing with these questions their Lordships think it desirable in the first place to refer to *Buhuns Kowur v. Lalla Buhoree Lall* (1), a decision of this Board on the corresponding section of the Code of 1859, which is the leading authority as to the scope of the section. It was held in that case that the effect of the section was not to make these *benami* transactions illegal,

(1) (1872) 14 Mco., I.A., 496.



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but only to prohibit for reasons of public policy a suit against the certified purchaser on the grounds specified in the section; and in *Lokhee Narain Roy Chowdhry v. Kalypuddo Bandopadhyaya* (1), it was expressly ruled by this Board, following that decision, that where the certified purchaser is a plaintiff, the real owner, if in possession, and if that possession has been honestly obtained, is not precluded by the section from showing the real nature of the transaction.

Now it is clear under these rulings that, while the section protects the certified purchaser, so long as he retains the possession given him by the court, from a suit by the true owner, if he allows the real purchaser "being the true owner" to get possession, the section does not enable him to sue for possession, because possession has come into the hands of the true owner, who is entitled to it.

If then the true owner is subsequently dispossessed by the certified purchaser, is he precluded by the section from suing for recovery of possession? That must depend on the question whether he is to be regarded as suing "on the ground that the purchase was made on behalf of the plaintiff or on behalf of someone through whom the plaintiff claims" within the meaning of the section. In such a case, if the true owner has been in possession for less than twelve years, he will no doubt have to aver and prove as part of his cause of action that the auction purchase was made on his behalf, but that is not the case here, and their Lordships express no opinion about this question as it has not been argued before them.

Where, however, as in the present case, the real purchasers have been allowed to remain in adverse possession for more than twelve years before dispossession, they are entitled to sue for possession on the title so

(1) (1875) L.R., 2 I.A., 154.

acquired under the Limitation Act, and it is unnecessary for them to aver or prove that the auction purchases were made on their behalf.

In their Lordships' opinion the provisions of section 66 of the Code of Civil Procedure, 1908, and the corresponding sections of the earlier Codes have no application to such a case.

A suit based on dispossession after twelve years' adverse possession is clearly not a suit "on the ground that the purchase was made on behalf of the plaintiff or on behalf of someone through whom the plaintiff claims" within the meaning of the section, and does not become so merely because the plaintiff as part of an alternative cause of action sets up and proves that the purchases were, in fact, *benami*.

The plaintiffs are therefore entitled to succeed as regards the properties which were included in the auction purchases, except in so far as they are included in the *waqf* created by Abdul Latif in 1909. It has been found by both courts that the gift to the *waqf* was duly perfected according to the rules of Muhammadan law and by the High Court that the first defendant was duly appointed *mutwalli* or trustee of the *waqf* after the founder's death, and the plaintiffs' claim to the *waqf* properties has therefore been rightly disallowed.

In these circumstances the appeal must be allowed and the decrees of the lower courts varied by giving the plaintiffs a decree for the properties covered by the auction purchases and not included in the *waqf*, but in the circumstances their Lordships are of opinion that the plaintiffs should only recover half their costs in the courts below and here, and they will humbly advise His Majesty accordingly.

Solicitor for appellant : H. S. L. Polak.

Solicitors for respondent : T. L. Wilson & Co.

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SHIB CHANDRA AND ANOTHER (DEFENDANTS) v. LACHMI  
NARAIN AND OTHERS (PLAINTIFFS).

[On appeal from the High Court at Allahabad.]

*Mortgage—Redemption—Provision for redemption of properties separately—Deficiency in sum advanced—Proportionate reduction on separate redemption—Redemption by purchaser—Lis Pendens—Revenue paid by mortgagees—Transfer of Property Act (IV of 1882), sections 52, 83.*

Several properties were mortgaged together in 1905, the consideration being stated to be an advance of Rs. 35,000; the mortgagors agreed to pay a fixed annual sum as interest and the Government revenue. By the deed the properties could be redeemed separately on payment of a sum specified for each, provided that all interest on the whole mortgage had been paid or tendered. The sum actually advanced was only Rs. 30,984. In 1910 the mortgagees obtained a decree for interest, and in 1912, while an appeal by the mortgagees was pending, the mortgagors sold two of the properties. On appeal the decreed amount was increased by adding interest pending the suit. The purchasers deposited money in court under the Transfer of Property Act, 1882, section 83, with a view to redemption of the purchased properties. Upon an issue whether the deposit was sufficient:—

Held (1) that, both on general principles and under section 52 of the Transfer of Property Act, the purchasers were liable in respect of the increase in the amount for interest decreed on appeal.

(2) That though the sums specified as payable on redemption of the separate properties, and the annual sum fixed for interest, could properly be reduced in proportion to the deficiency in the sum advanced, Government revenue paid by the mortgagees could not be so reduced, as they were entitled to deduct it (with interest thereon) from any interest received by them, and to credit in account only the balance.

(3) That consequently the deposit was insufficient.

Decree of the High Court reversed.

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\*Present: Lord BLANESBURGH, Lord TOMLIN, and Sir BINOD MITTER.

CONSOLIDATED APPEALS (Nos. 126 and 127 of 1926) from two decrees of the High Court (December 11, 1923) reversing two decrees of the Subordinate Judge, Moradabad.

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The two suits giving rise to the appeals were brought by the respondents to redeem two separate properties which with other properties were the subject of a mortgage, dated the 25th of March, 1905. The plaintiffs respondents had purchased the properties in suit in 1912 from the mortgagors. The issue arising was whether a deposit made by the plaintiffs under the Transfer of Property Act, 1882, section 83, was sufficient.

The trial Judge held that the deposit was sufficient, but the High Court reversed that decision.

The facts appear from the judgement of the Judicial Committee.

1929. May 13, 14. *Dunne, K. C. and Dube*, for the appellants.

*DeGruyther, K. C. and Parikh*, for the respondents.

June, 21. The judgement of their Lordships was delivered by Sir BINOD MITTER :—

These are two consolidated appeals against two decrees dated the 11th December, 1923, of the High Court of Judicature at Allahabad, setting aside two decrees dated the 18th of January, 1921, of the court of the Subordinate Judge, Moradabad.

The two suits in which the decrees of the High Court were passed were brought by the plaintiffs respondents separately against the appellants to redeem two items of properties covered by a mortgage, dated the 23rd of March, 1905, namely, 13 biswas of the village Sadat Bari and the whole village Rudain, respectively, and the question for determination now is whether the deposit made by the plaintiffs under section 83 of the Transfer of Property Act on the 29th of June, 1912, was sufficient.

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On the 23rd of March, 1905, the original mortgagors executed a mortgage deed in favour of the appellant Shib Chandra and another who, on the same day, executed a lease in favour of the mortgagors in respect of the mortgaged premises and under that lease the mortgagors agreed to pay Rs. 2,325 in two instalments per annum (which also was the agreed amount of interest under the mortgage-deed), together with the sum of Rs. 1,526 as Government revenue on the properties. It was agreed that if there was any deficiency in the payment of interest or lease money then the amount should carry compound interest at the rate of 1 Re. per cent. per mensem. It was provided by the mortgage deed that each property could be separately redeemed in the month of June of any year on payment of the amount entered against it in the deed, provided always that the interest on the whole mortgage money had been paid or tendered at the time of such redemption. The consideration stated in the mortgage deed was Rs. 35,00. The only sum the mortgagors ever repaid was Rs. 1,000 in January, 1907.

On the 14th of January, 1910, the mortgagees brought a suit in the court of the Subordinate Judge of Moradabad (hereinafter referred to as the original suit) against the mortgagors for recovery of Rs. 12,327-5, being the interest or lease money up to June, 1909; together with compound interest at 12 per cent. per annum as provided for in the mortgage deed and in the lease. The mortgagees further claimed interest *pendente lite* and interest up to realization, and they also prayed for sale of the mortgaged properties in default of the payment of the amount that might be decreed in their favour and claimed possession of the mortgaged premises. The mortgagors contended that the whole of the Rs. 35,000 mentioned in the mortgage deed had not been advanced, but that a sum of Rs. 30,984 only was advanced and that

the interest payable on the mortgage or the lease money should be proportionately reduced.

On the 23rd of February, 1912, the Subordinate Judge decided that the sum actually advanced was Rs. 30,984, and that, therefore, the amount of annual interest or lease money was Rs. 2,058-3-6 and not Rs. 2,32, as stated in the mortgage deed and the lease. He accordingly passed a decree for Rs. 10,720-10-4 and interest thereon at the rate of 6 per cent. per annum until realization with costs amounting to Rs. 1,770-2-8. He also gave the mortgagees a decree for sale under order XXXIV, rule 4, of the Code of Civil Procedure, 1908, in default of the payment of the decretal amount on or before the 22nd of August, 1912, and he further decreed that Rs. 12,812-7-3 would be due on that date. He further decreed possession of the mortgaged properties to the mortgagees, and they, on the 3rd of April, 1912, obtained symbolical but not actual possession.

It appears that the Subordinate Judge did not allow any interest during the pendency of the original suit and the mortgagees (that is the present appellants) appealed against the decree of the Subordinate Judge to the High Court of Judicature at Allahabad and the High Court, on the 27th of January, 1914, varied the decree of the Subordinate Judge by allowing interest during the pendency of the suit to the extent of Rs. 2,706-2, and they allowed the costs of the appeal, which were fixed at Rs. 416-12-6. The decree of the Subordinate Judge was therefore increased by Rs. 3,122-14-6.

While the appeal of the mortgagees was pending, the mortgagors on the 12th of April, 1912, sold and conveyed their equity of redemption in mauza Sadat Bari to Pandit Bihari Lal (the predecessor in interest of the present plaintiffs in the first suit—that is suit No. 333 of 1919), and they also on the 22nd of June, 1912, sold and con-

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veyed their equity of redemption in mauza. Rudain to Rameshwar Sahai and Bhola Nath (the latter being the predecessors in interest of respondents two and three in suit No. 371 of 1919).

In the mortgage deed in suit the sum of Rs. 13,000 was entered as the principal amount against village Rudain, and the sum of Rs. 5,000 was entered as the principal against Sadat Bari. Bihari Lal, the purchaser of Sadat Bari, also purchased certain other items of property: i.e., a grove consisting of some land in Majahidpur Sarai and certain houses and shops, and the sum of Rs. 4,000 was entered against them as the principal. This last-mentioned property is not the subject matter of the suits for redemption.

The conveyance of the 12th of April, 1912, mentioned that the sum of Rs. 32,000 was left with the purchaser for payment of the miscellaneous debts due under decrees and mortgage money and other debts, etc., payable by the vendors, and it was agreed that the vendors should cause to be paid by the purchaser under their supervision the sum of Rs. 32,000 to the creditors of the vendors. By the deed of the 27th of June, 1912, the sum of Rs. 13,000 was left with the purchasers of village Rudain for payment to the mortgagee.

On the 29th of June, 1912, a sum of Rs. 41,837-5-6 was deposited in court by the purchasers under section 83 of the Transfer of Property Act, and the respondents allege that on this deposit being made they were entitled to call upon the mortgagees to reconvey the properties which they had purchased.

The question is whether this sum was sufficient. The sum of Rs. 41,837-5-6 was made up of the following items:—

- (a) Rs. 16,120-14-6 for principal allocated for redemption of all the pro-

perties purchased by Bihari and interest on the entire mortgage from January, 1910, to June, 1912.

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(b) Rs. 4,716-7-0 paid by Bihari towards satisfaction of the decree in part of the original suit.

(c) Rs. 13,000-0-0 paid by Rameshwar Sahai.

(d) Rs. 8,000-0-0 paid by Rameshwar Sahai towards the decree in the original suit.

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Total ... Rs. 41,837-5-6

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The Subordinate Judge in his judgement has held that the sum that the purchasers ought to have deposited was Rs. 45,935-13-3. He held that although the judgement of the High Court was not delivered till January, 1914, still on the date of the tender that sum which the High Court allowed in addition to what the Subordinate Judge in the original suit had awarded was in fact due on the 29th of June, 1912. He also held that although the principal sum of Rs. 35,000 had been held not to have been paid, but that only Rs. 30,984 had been advanced on the mortgage, still there should be no proportionate reduction of the sum fixed for the redemption of each item of property as entered in the mortgage deed against that property. He further held that the costs of the appeal to the High Court as also the land revenue that had been paid to the Government by the mortgagees with interest thereon should be taken into account. In his view Rs. 45,935-13-3 was the sum that the purchasers had to pay before they could redeem the properties purchased by them. Accordingly he held that the tender fell short



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by Rs. 4,098-7-9. On appeal, however, the High Court held that the sufficiency of the amount of deposit should be judged by the state of things on the 29th of June, 1912, irrespective of the result of the appeal, and they further held that as only Rs. 30,984 was advanced instead of Rs. 35,000, the equitable method of dealing with this would be to distribute the reduction of principal over each item of property specified at the foot of the mortgage, and that by adopting this method the principal sum payable by the purchasers would be Rs. 19,472-12-11 instead of Rs. 22,000.

Their Lordships are of opinion that the view of the High Court on this last-mentioned point is correct, and in fact Mr. *Dunne*, for the appellants, did not seriously contest it. Their Lordships are, however, of opinion that the purchasers were bound by the decision of the High Court whereby that Court increased the amount awarded by the Subordinate Judge in the original suit by Rs. 3,179. The purchasers can have no higher rights than their vendors, and it appears to their Lordships also that the sale having been made during the active prosecution of the litigation between the mortgagees and the mortgagors, the purchasers must be bound by the result of the litigation: *See* section 52, Transfer of Property Act, and *Faiyaz Husain Khan v. Prag Narain* (1).

Their Lordships are further of opinion that Rs. 926-9-10 were due to the mortgagees, for Government revenue and interest thereon, both by the terms of the mortgage deed and the lease, as also by the general law of mortgage in India.

The High Court in its judgement has held that the whole of this sum should not be added for the purpose of testing the sufficiency of the tender, but that it should be equitably distributed as against the purchasers in the

(1) (1907) I.L.R., 29 All., 339.

same way as the principal amount of Rs. 22,000 is to be distributed. Even if this view were taken, the amount would work out at about Rs. 614, which would make no difference in the result.

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Their Lordships, however, think that this view of the High Court is not correct. It is quite clear that the mortgagees by paying the Government revenue are entitled to add the same for the purpose of ascertaining their total dues under their mortgage: See *Nugenderchunder Ghose v. Sreemutty Kaminee Dossee* (1). In the present case under the mortgage deed Government revenue has to be deducted in the first instance from the entire income, therefore, it should be deducted before any credit for interest is given at all, and when the tender of interest was made on the 29th of June, 1912, the mortgagees were entitled to deduct the Government revenue paid by them and interest thereon from the interest which had been paid by the mortgagors and only credit the balance to the interest account, and as the purchasers had to pay the entire interest before they could call for redemption, this suggestion of the High Court seems to their Lordships to be wrong.

Mr. DeGruyther contended that as the purchasers deposited all instalments of interest from January, 1910 to June, 1912, and added thereto the interest on the same they had thereby in fact paid the full interest during the pendency of the original suit, namely, from June, 1909 to February, 1912.

The Subordinate Judge, in the original suit, had decreed interest up to June, 1909, and fixed the same at Rs. 10,720-10-4, therefore, on the 1st of June, 1910, the interest that must be calculated would be not only interest on the instalment from June, 1909, to June,

(1) (1867) 11 Moo. I.A., 241 (258).

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1910, but upon the decreed amount of Rs. 10,720-10-4, plus the instalment that fell due between June, 1909, and June, 1910, as the mortgage deed provided for compound interest. The argument of Mr. *De Gruyther*, therefore, seems more specious than sound. If calculation is made on this basis even then the deposit is insufficient.

Deducting, however, from the said sum of Rs. 45,935-13-3 (which the Subordinate Judge held due in June, 1912), the sum of Rs. 2,527-3-1, which represents the difference between the said principal sum of Rs. 22,000 and Rs. 19,472-12-11 which the High Court rightly held to be the principal sum payable by the purchasers, the deposit should have been for Rs. 43,405-10-2. The result, therefore, is that the deposit was insufficient and interest did not cease to run from the 29th of June, 1912, and their Lordships accordingly hold that the decrees of the High Court should be set aside and the cases remitted for ascertainment of the sum which is due to the mortgagees from the mortgagors and they are of opinion that a decree for redemption under order XXXIV, rule 7, should be passed on the aforesaid basis.

The contesting respondents will pay to the appellants the costs of these appeals as also their costs in the courts below. The mortgagees will also be at liberty to add their costs to their claim. The mortgagors, if they have incurred any costs, will bear the same.

Their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellants : *H. S. L. Polak*.

Solicitors for respondents :—*Douglas Grant and Dodd*.

*v. Howard* (1), *Sadiq Ali v. Anwar Ali* (2) and *Hurrish Chunder v. Kali Sundari* (3), referred to.

THIS was an appeal under section 10 of the Letters Patent from an order of MUKERJI, J., passed in the course of the winding-up proceedings of a company. It was first heard by SULAIMAN, A. C. J., and WEIR, J., who delivered the following judgements.

WEIR, J.—This is an appeal under clause X of the Letters Patent from an order passed by MUKERJI, J., on the 19th of July, 1927. The appellants are the trustees of the estate of Lala Raghunull, and the respondent is the Dehra Dun Mussoorie Electric Tramway Company, Ltd. (in liquidation). The facts, shortly stated, are these:—Lala Raghunull obtained a mortgage on the assets of the respondent company to secure a sum of Rs. 3,00,000. This mortgage is dated April 25, 1923. The mortgage deed contains a receipt for Rs. 1,50,000 stated to have been paid before the mortgage was executed and a covenant to advance further sums up to the maximum of Rs. 1,50,000, if so required for the purposes of the company. It is stated that Rs. 27,000 have been since advanced in pursuance of this covenant. On the 28th of July, 1924, Lala Raghunull instituted a suit in the Calcutta High Court (Original Side) on foot of this mortgage, and on the 12th of January 1926, he obtained a decree for sale of the property comprised in the mortgage, if the sums claimed by him were not first paid. On the 29th of January, 1926, an application for winding up the company was made and an order staying all proceedings against it was passed. On the 5th of March, 1926, Lala Raghunull asked to have the order discharged so far as the execution proceedings under the judgement obtained by him were concerned. On the 26th of March, 1926, a winding-up order was passed by MUKERJI, J., in exercise of the extraordinary jurisdiction of this Court under clause (9) of the Letters Patent, the winding-up proceedings having been transferred to him, under that clause. On the 8th of April, 1926, liquidators were appointed, and on the 5th of September, 1926, Lala Raghunull died. The present appellants are, as I have said, the trustees of his will. The order of MUKERJI, J., runs as follows:—"The application for leave to execute the decree is refused" and another order made by him on the same date is as follows:—"The application for leave having been re-

(1) (1895) I.L.R., 17 All., 488.

(2) (1922) I.L.R., 45 All., 66.

(3) (1882) L.R., 10 I.A. 4.

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fused, it will be for the representatives of Lala Raghumull to decide whether they will submit their claims before the official liquidators or whether they will not". In the course of his judgement, in which he held that he was entitled to go behind the decree of the Calcutta High Court and to ascertain what amount, if any, was really due under the mortgage upon which that decree was founded, MUKERJI, J., said :—"If the decree be found to be supported by good consideration the applicants" (the present appellants) "may be, if they agree, put down as secured creditors with a first charge on the entire, or a portion, of the assets of the company, and they may thus be put in the same position in which they would be if they could execute the decree by themselves. However, that is a point which has not yet arisen for decision. After the consideration of the decree has been inquired into, it will be time to see whether the decree should be executed by the representatives of Lala Raghumull, or whether the liquidators should pay them as first charge-holder out of the assets of the company, or out of such parts of the assets of the company, as may have been validly charged by the company". In the course of the same judgement MUKERJI, J., gave his reasons for declining to allow the decree-holders to execute the decree, the reasons being that the decree was passed *ex parte*, and that he considered that the examination before him of the managing director of the company disclosed at the very least "an utter recklessness on the part of the management of the company". We decided that we would not go into the merits of the question whether on the facts of the case (if they had been fully disclosed, and considered by MUKERJI, J.) he ought or ought not to allow the appellants to execute the decree of the Calcutta High Court of the 12th of January, 1926. Our reasons were that we thought that if MUKERJI, J., had jurisdiction to make the order from which this appeal has been taken, we ought not to do anything which would prejudice his decision, especially when the matter has not been fully considered by him.

On behalf of the respondent company a preliminary objection has been taken, namely, that no appeal lies, because the order of MUKERJI, J., is not a judgement within the meaning of clause (10) of the Letters Patent.

It is clear that in this clause the word "judgement" cannot have the same meaning as it has in the Civil Procedure

Code, so the provisions of that Code are not directly in point; except in so far as they expressly prohibit an appeal from a decision of a court. When dealing with the effect of this clause in the Letters Patent, BURKITT, J., in *Wall v. Howard* (1), observed: "In construing the word 'judgement' in section 10 of our Letters Patent, which were prepared in England and use the phraseology of the English Courts, it is impossible to give to it the restricted meaning of the word 'judgement' as defined in the Code of Civil Procedure. As used in England, it is wide enough to embrace the definitions of decree, judgement and order in that Code". This passage was cited with approval in *Sadiq Ali v. Anwar Ali* (2), by the CHIEF JUSTICE and Mr. Justice PIGGOTT, who heard the latter case. In that case they pointed out that a practice had grown up in this Court of regarding those matters, which are mentioned in order XLIII, rule 1, of the Code of Civil Procedure, as being generally appealable from a single Judge of this Court to a Bench. But the order of MUKERJI, J., from which this appeal is brought, is not of any of the kinds enumerated in rule 1 of order XLIII. Another test has, however, been applied to determine whether an order is appealable under clause 10 of the Letters Patent, namely, whether it finally concludes or disposes of the rights of the parties; and in this case the order of MUKERJI, J., although it does not finally determine that the appellants shall not get their money, does finally determine the right of the liquidators to investigate the debt in respect of which the appellants seek to execute judgement; and the order also finally determines that the appellants have no right to enforce their judgement by any means whatsoever unless they comply with the terms imposed by the order. This appeal comes before us on the question whether MUKERJI, J., had jurisdiction to make such an order, and I think that on this question certain passages from the report of the case of *Hurrish Chunder v. Kali Sundari* (3), are in point. In that case a question arose concerning an order of Mr. Justice PONTIFEX of the Calcutta High Court in respect of an order which had been transmitted for execution, after an appeal had been allowed by His Majesty in Council. Mr. Justice PONTIFEX considered that the decree as it then stood was not capable of execution, and refused to transmit it to the court below for execution. An appeal

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(1) (1895) I.L.R., 17 All., 438. (2) (1922) I.L.R., 45 All., 66.

(3) (1882) L.R., 10 I.A., 4.



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was preferred under section 15 of the Letters Patent of the Calcutta High Court, and the matter subsequently came on appeal before their Lordships of the Privy Council. Their Lordships, when dealing with the appeal, observed as follows:—"These learned Judges held (and their Lordships think rightly) that, whether the transmission of an order under section 610 would or would not be a merely ministerial proceeding, Mr. Justice PONTIFEX had in fact exercised judicial discretion and had come to a decision of great importance which, if it remained, would entirely conclude any rights of Kali Sundari to an execution in this suit. They held, therefore, that it was a judgement within the meaning of section 15." After summarising the reasons which had been given by the Chief Justice of the Calcutta High Court for holding that no appeal lay under the Letters Patent, their Lordships continued: "Their Lordships do not think that Mr. Justice PONTIFEX can be properly treated as having usurped jurisdiction; but, if he had, this would have been a valid ground of appeal, and they are unable to agree with the CHIEF JUSTICE, that, if a Judge of the High Court makes an order under a misapprehension of the extent of his jurisdiction, the High Court have no power by appeal, or otherwise, in setting right such a miscarriage of justice".

The order of MUKERJI, J., finally determines the rights of the parties to the extent which I have already indicated, and this appeal is taken on grounds that he had no jurisdiction to make the order under appeal. So I think that an appeal lies under clause 10 of our Letters Patent.

It has been strenuously contended by counsel for the appellants that, since the decree of the 12th of January, 1926, was passed by a court in another jurisdiction, MUKERJI, J., had no jurisdiction to go behind it, and inquire into the consideration for the mortgage. In my opinion this argument is not well founded. The distinction which was sought to be drawn between the case before us and cases which have been decided in England is this, that under the Judicature Act every Judge has and can exercise the powers of every other Judge, and that it is by virtue of this rule of law that a Bankruptcy Court or Company Judge of the High Court in England can take cognizance of actions or proceedings pending against any bankrupt or company in liquidation, and can go behind a judgement of another Judge of the High Court. I think that there are answers to this argument. The first is

that the jurisdiction to go behind a judgement in bankruptcy proceedings is very much older than the Judicature Act. Thus, for instance, in *Ex parte Bryant* (1), Lord ELDON said: "Proof upon a judgement will not stand merely upon *that*, if there is not a debt due *in truth and reality*, for which the consideration should be looked to". The reason why a Bankruptcy Court can go behind a judgement does not depend upon the fact that the jurisdiction of the court which pronounced the judgement is either subordinate to or concurrent with the jurisdiction of the Bankruptcy Court. It has been explained several times by the courts in England that the court can go behind the judgement because, either in bankruptcy or when a company is in liquidation the rights of a third set of parties, namely the creditors of the bankrupt or of the company, intervene, so that a judgement which may be perfectly fair *inter partes* may be ignored in the interest of the creditors, in order that there may be an equitable distribution of the property. In *Ex parte Lennox* (2), LINDLEY, L. J., said: "If we looked at the case only as between the judgement-creditor and the judgement-debtor, I am not aware that there are any grounds upon which the judgement-debtor is entitled to have the judgement set aside or execution stayed. I concede that to the fullest extent. I can see no equitable ground, and I can see no legal ground for doing that. But it appears to me that it by no means follows as a matter of course that the judgement-creditor is entitled to have a receiving order made against his judgement-debtor. Bankruptcy proceedings are not like ordinary proceedings; they are a very serious matter, not only to the debtor himself but to all his other creditors." He also referred to *Ex parte Kibble* (3), as being conclusive on this point. BUCKLEY, L. J., in *In re Van Laun* (4), said "If there be a judgement it is not necessary to show fraud or collusion. It is sufficient, in the language of Lord ESHER, to show miscarriage of justice, that is to say, that for some good reason there ought not to have been a judgement. Exactly the same thing I think is true of an account stated or of a covenant." In exercise of the jurisdiction to control proceedings against a company when it is in liquidation, JESSEL, M. R., where a company having its central office in

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- (1) (1813) 1 V. and B., 211 (214).      (2) (1835) 16 Q.B.D., 315 (328).  
(3) (1875) 17 Ch. App. Cas., 373.      (4) (1907) 2 K.B., 23 (31):



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London was in liquidation, stayed proceedings against the company in the Irish courts, proceedings having been taken by a creditor resident in Ireland, the company having carried on business in Ireland and having assets there. The reasons given by JESSEL, M. R., were that the English Companies Act, 1862, applied to the whole of the United Kingdom, see *In re International Pulp and Paper Co.* (1). Similarly the Indian Companies Act applies to the whole of India. In the same way in *In re Wanzer Ltd.* (2) NORTH, J., when a company was in liquidation, proceeded on the assumption that he could restrain a Scotch landlord from proceeding with sequestration to enforce a hypothec, which, under Scotch law, he was entitled to enforce because the company was his tenant of certain lands in Scotland, and in consequence of which an officer of the sheriff had taken possession of certain goods on the premises in Scotland. I, therefore, think that the fact that the mortgage decree of the 12th of January, 1926, was granted by a court in another jurisdiction would not prevent MUKERJI, J., from going behind it, if he would be entitled to go behind a similar decree pronounced by a court of competent jurisdiction in the United Provinces.

The next point argued by counsel for the appellants was that the order of MUKERJI, J., was unfair because it would force the appellants to disclose the case which they might wish to make if the judgement of the 12th of January, 1926, were challenged in a suit or in any other proceedings to set it aside. There are two answers, I think, to this argument. The first is that it is the duty of the court, and of the liquidators, to be impartial between all the creditors of the company, and that the case is quite different from one in which an ordinary litigant might seek by means of "fishing" interrogatories or otherwise to gain an advantage over his opponent. The other answer is, that a very similar point was taken and overruled by HALL, V. C., in *Massey v. Allen* (3). In that case Massey was the trustee of certain shares in a company which was in liquidation, and had transferred the shares to another person. In the liquidation proceedings Massey had been placed on the B list of contributories. He subsequently assigned to the company all his rights to be indemnified by Allen or another person (the ownership of the shares

(1) (1876) 3 Ch. D., 594.

(2) [1891] 1 Ch., 305.

(3) (1878) 9 Ch. D., 164.

being disputed) and authorized the company to sue in his name. HALL, V. C., required the defendant Allen to attend for examination under section 115 of the Companies Act of 1862, which corresponds with section 195 of the Indian Companies Act. It was argued on Allen's behalf that this was "an unfair attempt on the part of the liquidator to obtain a sight of the defendant Allen's brief", when the liquidator had got the sanction of the court to carry on the action in Massey's name against Allen; but the Vice-Chancellor overruled this objection, holding that the court had jurisdiction to examine Allen because he could give material information in reference to increasing or protecting the assets of the company, i.e., in increasing the assets by obtaining payment of calls on the shares in question.

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The last, and, to my mind, the crucial point in this case is whether MUKERJI, J., has jurisdiction to order a mortgagee who has obtained a judgement entitling him to recover the amount due under his mortgage to prove that the sum for which he has obtained judgement is really due; or that the whole of it is due to him by the company. For the reasons which I have given, I think that the appellants are not in any better or worse position than that of a mortgagee who had obtained a decree on foot of his mortgage from a court in the United Provinces. But several other questions arise. The powers which MUKERJI, J., has in the present case are conferred upon him by sections 169, 171 and 229 of the Indian Companies Act, corresponding to sections 140 and 142 and 207 of the English Act of 1908. Under the first of these sections, after the presentation of a petition for winding-up the company, he has power to restrain further proceedings in any proceedings or suit against the company. Under the second of these no suit or legal proceedings can be instituted or continued against the company, except by leave of the court, when a winding-up order has been made; and by the last of the three sections it is provided that in the winding-up the same rules shall prevail with regard to the rights of secured and unsecured creditors and to debts provable in the winding-up of an insolvent company as are in force for the time being under the law of insolvency with respect to the estate of persons adjudged insolvent. A company which is in liquidation is to be deemed to be insolvent until it is shown to be solvent.

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(*per Lord SELBORNE, L. C., in In re Milan Tramways Company* (1); and it has been contended that in consequence of this provision in section 229 of the Indian Companies Act, section 28(6) of the Provincial Insolvency Act applies to this case. That clause runs as follows:—"Nothing in this section shall affect the powers of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed". It is, therefore, argued that this deprives MUKERJI, J., of any jurisdiction to interfere with the right of the appellants to enforce their decree. In reply it has been argued that in India the word "rules" in section 229 of the Indian Companies Act must be given the meaning which it has in the General Clauses Act, section 3(47), namely, rules made in exercise of a power conferred by any enactment; and that, therefore, section 28(6) of the Provincial Insolvency Act is not a rule within the meaning of section 229 of the Indian Companies Act. That section has been copied almost verbatim from section 207 of the English Act and in the English Act the word "rules" includes certain rules of statute law and of equity (see Buckley on Companies, 10th edition, p. 485); but it has been held in England that section 10 of the Judicature Act, which is re-enacted in section 207 of the English Companies Act of 1908, does not include all the bankruptcy rules, e.g., it does not introduce the "order and disposition rule" corresponding to section 28(3) of the Provincial Insolvency Act (see Buckley on Companies, page 485). It has never, as far as I am aware, been held that in England the provisions of the Bankruptcy Act which correspond to section 28 (6) of the Provincial Insolvency Act have any effect upon the jurisdiction to stay proceedings against a company in liquidation; and I think that if there be a conflict between provisions introduced by reference, e.g., such a provision as section 28 (6) of the Provincial Insolvency Act, and express provisions in the "incorporating" Act, such as section 171 of the Indian Companies Act, the latter ought to prevail. I, therefore, think that this argument has no force.

Assuming that section 28 (6) of the Provincial Insolvency Act is out of the way, the question arises, can MUKERJI, J., require the appellants to prove the amount of their mortgage decree before the liquidator? I think that he cannot. I have

(1) (1884) 25 Ch. D., 587 (591).

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been unable to discover any case in the English or Indian reports in which a mortgagee, who wished to stand outside bankruptcy or liquidation proceedings, has been forced to prove the amount which is due under his mortgage, or to prove the amount due under a decree which he has obtained in a suit upon the mortgage. There are cases in which the English courts have held that where a mortgagee has obtained a judgement upon foot of his mortgage he ought not, except under very special circumstances, to be prevented from enforcing it against a company which is in liquidation. Thus, in *In re The Great Ship Company Ltd.*, (1), better known as "*Parry's case*", TURNER, L. J., observed: "The court, in dealing with the question thus dependent upon its discretion, is bound to look upon the legal rights of the parties and to the interests not of one particular class of creditors, but of each particular class of creditors who may be affected by the decision at which it shall arrive. I think, with all deference to the Master of the Rolls, that there is nothing in this Act of Parliament" (Companies Act, 1862) "which gives to the general creditors of this company any right to have their interest seen to in preference to the interest of the particular creditor whose case may come before the court. I think it is the duty of the court to hold an even hand between the interests of all parties, and I take this section to have been introduced with a view to meet cases in which there might have been unfair proceedings on the part of the creditor who is seeking to enforce those proceedings against the assets of the company." In that case it was held that leave to execute the judgement ought to be granted and it is noted that the action had been "strongly opposed". This passage shows, what indeed cannot be doubted, that the court has jurisdiction to restrain proceedings in a proper case. But I have, though not without much hesitation, come to the conclusion that it does not dispose of the case before us. In a later case, *In re David Lloyd and Co.*, (2), before an order to wind up the company had been made, the appellant had commenced an action against it to realize his security; and, though the court did not hold that there was no jurisdiction to stay the action, it expressed a very strong opinion against doing so. In order to appreciate the effect of this decision it is necessary to read the judgement of MALINS,

(1) (1868) 4 DeG. J. and S., 68; (2) (1877) 6 Ch. D., 339.  
46 English Reports, 839.

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V. C., which was reversed. He decided that he would stay the action, put up the property for sale, and allow the appellant to bid, and he pointed out that, if this course were taken, nobody could be injured. If the appellant bought the property for as much as the amount of his security, which was £30,000, he would be in the same position as if he were allowed to foreclose, and if he got the property for less than £30,000 he would be able to prove against the company for the balance of his debt; whereas, if the property sold for more, the appellant would first be paid in full and the residue would be available for distribution among the creditors and shareholders of the company. But the court of appeal held that this was no good reason for refusing to permit the appellant to continue his action. JAMES, L. J., said at page 344: "There being only a small or limited fund to be divided among a great number of persons, it would be monstrous that one or more of them should be harassing the company with actions and increasing costs which would increase the claims against the company and diminish the assets which ought to be divided among all the creditors; but that has really nothing to do with the case of a man who, for the present purpose, is to be considered entirely outside the company and who is merely seeking to enforce a claim not against the company, but to his own property"; and COTTON, L. J., said: "As the liquidators in the present case did not offer to put the mortgagee in the same position in which he would be when he obtains judgement in his action, but suggests that there are questions which may prevent him from having the right upon which he insists and to enforce which he brought the action, I am of opinion that these questions will be much better fought in the action and that there is no ground for refusing the mortgagee leave to proceed with his action." JESSEL, M. R., was a party to this decision, and followed it in *In re Langdendale Cotton Spinning Co.* (1). That was a case where the liquidator of a company sought to prevent a mortgagee of the property of the company from continuing an action which he had brought to realize the amount of his security. The amount due under the mortgage was admitted, and the liquidators of the company wished to sell the property. JESSEL, M. R., said that, if they wished to do that, they had better redeem; that to prevent the mortgagee from selling would be an interference with

(1) (1878) 8 Ch.D., 150.

*Errata to the Indian Law Reports, Allahabad Series,  
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Page ii (Index), line 11 from bottom, for "ex-propietary" read "ex-proprietary".

Page ii (Index), line 8 from bottom, omit "dash" between the words "Acts" and "Local".

Page 675, line 13, for "Plaitiffs" read "Plaintiffs".

Page 675, line 19, for "28" read "28,".

Page 675, line 2 from bottom, for "John" read "Sir John".

Page 688, line 19, for "Rs. 35,00" read "Rs. 35,000".

Page 689, line 7, for "Rs. 2,32" read "Rs. 2,325".

Page 698, line 19, for "company," read "company".

Page 699, line 9 from bottom, for "(3)," read "(3)".

Page 705, line 10 from bottom, for "does no" read "does not".

Page 721, line 14 from bottom, for "three," read "three".

Page 729, footnote, for "ch., W.," read "Ch. D.,".

Page 735, side margin, for "Boys, J." read "King, J.".

Page 741, line 6 from bottom, for "o rthe" read "or the".

Page 746, line 15 from bottom, for "annual" read "annul".

Please substitute pages 701-702, 707-708 and 769-770 for pages bearing similar folios issued with the September issue of I. L. R. Allahabad Series, for 1929.



his right; and that he (JESSEL, M. R.) saw no equity in the mortgagors which could deprive the mortgagees of those rights. *Ex parte Fletcher* (1) was a case in which the trustee in bankruptcy was required to deliver possession of a house of which the bankrupt was the lessee and to deliver it to the mortgagee of the lease. In delivering judgement JAMES, L. J., said: "The cases in which the court of bankruptcy has decided that it ought not to assume jurisdiction are cases where it was asked to draw within its jurisdiction a person outside the bankruptcy merely because his opponent had become a bankrupt." He went on to point out that if a stranger to the bankruptcy desired to submit to the jurisdiction of the court, he should be encouraged to do so, in order to prevent the necessity and expense of proceeding in another court. In that case the mortgagee was willing to prove his debt, and accordingly the court made an order that possession should be given to the mortgagee unless the trustee was willing to pay into court within 14 days the amount proved by the mortgagee to be due on his security. It is to be noted that in this case the mortgagee had voluntarily come into the bankruptcy proceedings, and had not started any proceedings in another court.

In the case before us the mortgagees are most unwilling to be drawn into the liquidation proceedings, and "it is a fundamental principle of insolvency law that, as regards his security, a secured creditor cannot be forced into the insolvency court at all. He can stand outside the insolvency court and proceed to enforce his rights outside the insolvency court altogether" *per* RANKIN, C. J., in *Official Assignee of Calcutta v. Ramratan Das* (2). I think, on the authority of the cases which I have cited, that this applies equally to proceedings for the compulsory winding-up of a company. The reason for staying a suit brought by an ordinary creditor or preventing him from enforcing a judgement obtained by him where the suit or judgement is against a company in liquidation is pointed out by SCRUTTON, L. J., in *The Anglo-Baltic and Mediterranean Bank v. Barber and Co.*, (3), in the following words: "The result of allowing a judgement-creditor to proceed to execute might be that instead of the assets being divided among the creditors *pari passu* the judgement-creditor

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(1) (1878) 9 Ch. D., 381.

(2) (1926) I.L.R., 54 Cal., 317 (325).

(3) (1924) 2 K.B., 410 (417).

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by enforcing his judgement would obtain an advantage over other creditors." But this reason does not apply to the case of a mortgagee, because he is entitled to recover the amount due under his mortgage in priority to all persons (except of course prior mortgagees) who have claims on the property and is entitled to be paid in full before other persons can get anything. It also seems to me that the reason why a Judge presiding over insolvency proceedings or liquidation proceedings can go behind a judgement obtained by an ordinary unsecured creditor is that such a judgement-creditor must prove the amount of his debt before he can get anything, whereas a secured creditor, if he so desires, can stand outside the insolvency or liquidation proceedings altogether and rely entirely upon his security. In the case before us, if judgement in the mortgage suit had not been delivered before the winding-up order was made, MUKERJI, J., could, and (as he himself says) would, have allowed the suit to proceed and would have allowed the liquidators to defend. But they are now faced by a judgement and the sole question is whether MUKERJI, J., has authority to go behind it. He says in the judgement under appeal that there is no case in which it has been held that a Judge must allow a mortgagee to execute his decree. But, also, there is no case in which it has (as far as I have been able to discover) been held that the court either in insolvency or in liquidation proceedings can require a mortgagee who has obtained a judgement on foot of his mortgage to prove that the amount for which he has obtained that judgement was really due to him, and was due in full. I think that, since the appellants in this case have a security which enables them to stand outside the liquidation proceedings, so that they could recover the amount of their decree without coming into the proceedings at all, MUKERJI, J., has no jurisdiction to order them to do so; or to make it a condition that they shall do so, before he allows them to execute their judgement or pays them the amount which he might find to be due to them. I think that he had jurisdiction to stay the execution, and to offer to redeem the mortgage, if satisfied that the amount of the decree is really due. I also think that, if the appellants chose to submit their claim to him, and if he found that the amount of the decree was due, the only course open to him would be either to pay it off, or to allow the appellants to



execute their decree. But I think that, since the appellants have refused to submit their claims to the scrutiny of the liquidators, MUKERJI, J., has no jurisdiction to attempt to force them to do so, though I think that he can stay the execution of the decree for a reasonable period of time in order to enable the liquidators to make up their minds whether they will or will not take other steps to attack the decree. It seems to me that the power to stay execution of a decree, such as this, in a case like the present is limited to the extent which I have indicated. I would, therefore, vary the decree of the court below by staying the execution for a period of six months in order to give the liquidators time to decide what proceedings, if any, they will take to attack the judgement obtained by the appellants, with liberty to the liquidators to apply for an extension of time if necessary for such purpose.

SULAIMAN, A. C. J. :—I agree that the definition of the word “judgement” as contained in the Code of Civil Procedure cannot be imported into the Letters Patent so as to give it a restricted meaning. If the order decides a cardinal point in dispute between the liquidators and the decree-holders, and adjudicates upon certain rights claimed by one party and denied by the other, it amounts to a judgement so as to be appealable under section 10.

The learned Judge has first decided that he has jurisdiction to impose terms on the decree-holders, even though they *prima facie* hold a mortgage decree in their favour passed by a competent court. This is a decision on a disputed point.

The learned Judge has remarked: “But in this case the official liquidators dispute the *bona fides* of the charge and the decree and seek to look into consideration for the judgement.” The conclusion of the learned Judge is as follows:—“The liquidators, in my opinion, are entitled to inquire into the consideration of the judgement, and in that case leave to execute the decree before an inquiry into the consideration has taken place should be refused.” He has expressed hesitation to accept an *ex parte* decree against the company as a *bona fide* one and above the scrutiny of the official liquidators. The actual decision is that after the consideration

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of the decree has been inquired into (by the liquidators) it would be seen how the decree should be executed.

Thus the liquidators have been declared to be entitled to scrutinize the decree, and the decree-holders have been directed to satisfy the liquidators that there was consideration for the mortgage. In this way the right of the decree-holders to realize their money will depend upon the result of the examination of the evidence by the liquidators, and the decree-holders will be compelled to lead evidence before the liquidators to prove their debt. Their right to execute the mortgage decree would presumably be denied if they failed to satisfy the liquidators.

In my opinion an order which contains a decision on the disputed questions of jurisdiction, the right of the liquidators to inquire into the existence of consideration, and the duty of the decree-holders to satisfy them and prove their debt, amounts to a judgement within the meaning of section 10. An appeal therefore lies.

My learned brother has discussed the relevant English authorities and rules of English law. It is unnecessary for me to refer to them. Their weight is unquestionable. I propose to consider this case on the basis of statutory enactments in India. The position of a company in liquidation is different from that of an ordinary insolvent. Under section 28 of the Provincial Insolvency Act, 1920, the property of an insolvent vests in the receiver as soon as he is appointed, while under the Indian Companies Act, it does not vest in the official liquidator at all. Under section 178 he merely takes into custody or under his control the property of the company in liquidation. If the official liquidator were merely the representative of the company or its shareholders, on whom the property has devolved, judgements passed against the company would be binding upon him. But his position is not like that. He is an officer of the court placed in charge of the assets of the company in order to facilitate the just distribution of the assets of the company among all the persons entitled. It is the duty of the court to protect the interest of the shareholders just as much as the interest of the creditors. The liquidator is the representative of the shareholders and the creditors alike. It follows that any judgement pre-

viously obtained against the company cannot operate as *res judicata* against the liquidator, inasmuch as he has an additional capacity of representing the creditors. The judgement not being one *inter partes*, section 11, Civil Procedure Code, would have no application. The entire body of the creditors could not have been impleaded in the previous suit and the judgement obtained in such a suit cannot be conclusive as against them or their representative. There is abundant authority for the view that a Judge in a winding-up proceeding can go behind a judgement debt and examine the existence of the debt. The English authorities quoted by MUKERJI, J., in the case of *In re the Union Indian Sugar Mills Co., Ltd., (in liquidation) v. Brij Lal Jagannath* (1), fully make out this point. That case has been followed in the case of *Ram Lal v. Kashi Charan* (2). It has been pressed before us very strongly that these English authorities are not helpful, inasmuch as in England there is only one High Court and every Judge of the High Court has both original and bankruptcy jurisdictions. But the cases quoted by my learned brother show that the same principle was applied even though the previous judgement was obtained in Scotland or Ireland. In my view the judgement passed by a learned Judge of the Calcutta High Court has no more efficacy than a judgement passed by any court subordinate to this High Court. The jurisdiction of the company Judge to examine the debt does not rest on his concurrent or superior powers. If the principle of *res judicata* applies, it would apply to all judgements, no matter by which competent court they were delivered. If it does not apply; it will not apply to either. Nor do I see any force in the argument that it would be grossly unfair to the decree-holder to be called upon to disclose his evidence to the liquidators. The inquiry has to be conducted by the court, and it is the court which has to be satisfied *prima facie* whether leave should be granted. The court ought to be depended upon as being absolutely impartial as between the company and the decree-holders. The question of disclosing evidence to the opposite party does not really arise. It would therefore follow on principle that a judgement debt against the company is not absolutely conclusive so as to prevent the Judge from going behind it in a

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liquidation proceeding. The difficulty lies in deciding whether there is any substantial difference in the case of a secured creditor. I should like first to dispose of a point raised on behalf of the appellant, that by virtue of section 229 of the Companies Act the whole of the Insolvency Act, including section 28 which absolutely protects a secured creditor, applies to these proceedings. That section provides that in the wind-up of an insolvent company the same "rules" shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvents. Presuming that a company in liquidation, even though it may eventually turn out that it has assets sufficient to pay off its debts, is insolvent, the section in the first place is very limited in its scope and does not make all the rules applicable, but only a limited class of the rules as specified therein. But I am clearly of opinion that the word "rules" used in the section does not mean the whole of the insolvency law. That word has not been defined in the Companies Act, and its definition must therefore be taken from the General Clauses Act, section 3(47), where it means rules made in exercise of a power conferred by any enactment. That this is the meaning which must be attributed to this word in the section is made further clear by reference to section 151, under which the Governor-General in Council is empowered to make rules, and to section 246 under which the High Court also has power to make certain rules. The same word cannot be interpreted to mean different things in different sections of the same Act when a contrary intention is not expressly made clear. Even if it were possible to bring in the provisions of section 28 indirectly by inference, they could not be held to be applicable if in direct conflict with the express provisions of the Act as contained in sections 169 and 171. And even if section 28 were applicable, it could not be applied when the very existence of a secured creditor is a matter in controversy. I am therefore clearly of opinion that section 28 of the Provincial Insolvency Act is not in our way. Although there is no express provision in the Companies Act protecting secured creditors, their safety rests on well established principles. Under the Transfer of Property Act an interest is transferred to a

mortgagee. A mortgagee's estate, so to speak, is carved out of the original estate and vests in the mortgagee. When a company is in liquidation, only the property of the company comes under the control of the court or the official liquidator. The interest which had previously passed to a mortgagee is separate and distinct and is not brought in. It follows that a mortgagee with his well defined interest can keep aloof and remain outside the jurisdiction of the court. His remedy to realize his security would ordinarily be unaffected by the insolvency of his debtor. He cannot against his will be dragged into the winding-up proceedings, or compelled to surrender his security and place himself on the same footing as other creditors by proving his debt. His rights are paramount and remain safe. Of course if he so chooses he may realize his security and prove for the balance, or he may surrender his security and prove for the whole debt; but he cannot be forced into doing that or to abandon his remedy. The liquidators may redeem the mortgage but cannot prevent him from selling the mortgaged property.

But although these rights of secured creditors must be taken to be well established, the Indian Companies Act has given a special power to the Judge in charge of the winding-up proceedings even as against secured creditors. Under section 169 the court may, before making an order for winding-up, restrain further proceedings in any suit or proceeding against the company upon such terms as it thinks fit, and under section 171, when a winding-up order has been made, no suit or legal proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose. The language of both these sections is very wide and applies to simple money creditors just as well as to mortgagee decree-holders. There is no justification for limiting the provisions contained in these two sections to simple money creditors. The Legislature has thought fit to confer special powers to grant leave. That implies authority to refuse leave. I do not see why these sections should be restricted to imposing a time-limit within which leave can be suspended. These sections imply that the court must consider all the circumstances and then exercise its discretion in granting or refusing leave. When a court has to make up its mind whether it should or should not grant leave, it has inherent jurisdiction to call for

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*prima facie* evidence to enable it to exercise its discretion. In requiring such evidence it does not necessarily call upon a judgement-creditor to "prove" his debt like debts admissible to proof under section 228. It is only asking for the production of *prima facie* evidence to satisfy itself that it is a fit case in which leave should be granted. The opinion of the court may finally determine whether leave should or should not be granted, but it would not be a final decision that the debt does not exist or that the decree is a nullity.

The cases referred to by my learned colleague, where leave was sought for and granted to mortgagees, themselves show that leave was necessary. Although they make it clear that leave should ordinarily be granted, they by no means assume the impossibility of leave being refused in special circumstances. When a section requires that leave has to be obtained, it does not mean that leave is to be granted automatically or as a matter of course, but that discretion to grant leave is to be exercised in a reasonable manner either way. It seems to me that if there is authority to grant leave, there is by implication power to refuse it, and if there is any discretion in the matter, the court must have jurisdiction to go into the facts in order to decide which way it should exercise its discretion. In special circumstances a court would have the power to refuse leave absolutely. I do not see any ground for holding that the refusal to grant leave should be limited to a fixed period or for any fixed purpose. I am therefore quite unable to hold that MUKERJI, J., was bound to stay the proceedings only for a reasonable period so as to allow the liquidators time to get the decree set aside. Stay of proceedings under section 169 is not identical with the refusal to grant leave under section 171. The power of the court to refuse leave is not in its scope co-extensive with the right of the liquidators to get a judgement debt set aside. The court may have such power even where it is impossible for the liquidators to succeed in their declaratory suit. One can easily imagine cases where liquidators may be quite unable to get a previous decree obtained against the company upset. A liquidator, when he starts proceedings in order to avoid a decree against the company, assumes the position of a representative of the company, unless it be a case of fraud, when third parties like creditors may also avoid it. As a representative of the company he is bound by the previous judgement.



Except on the ground of fraud he may not be allowed to show that the decree was a collusive one, and he certainly cannot be allowed to show that there has been a miscarriage of justice on account of want of proper defence being set up or sufficient evidence being led. Much less would he be able to avoid the decree on the mere ground that the whole or part of the consideration did not exist. But before a Company Judge in winding-up proceedings it is not necessary to show fraud or collusion in order to avoid a decree. It is quite sufficient to show a miscarriage of justice, that is, for some good reason there ought not to have been a judgement: *In re Van Laun* (1). I think that a Company Judge, if he is satisfied that the decree had been improperly obtained or that the consideration did not in fact exist, may refuse leave altogether, though the liquidator may be quite helpless in obtaining such a declaratory decree from another court. No case has been cited before us in which the fact of the mortgage debt itself was in dispute. Of course once the existence of the mortgage debt is admitted, the mortgagee's position is clear and strong, but when the fact of his being a mortgagee is itself in controversy, he cannot, when questioned, arrogate to himself the benefit accorded to a secured creditor without satisfying the court that he is such a secured creditor. The provisions of the law, and even section 28 of the Provincial Insolvency Act, give protection to secured creditors on the assumption that they are such secured creditors. But before a person can claim that advantageous position, he is bound to establish that he is entitled to claim it. In my opinion a Company Judge is not bound to accept a mortgage decree as absolutely conclusive any more than he is bound to accept a simple money decree as final. The only bar that there could have been would be that of *res judicata*. As pointed out above that bar does not exist. A Company Judge can therefore go behind a mortgage decree in the same way as he can go behind a simple money decree. The only difference is that in case of a simple money decree the judgement-creditor has no remedy open to him unless he comes in and proves his debt, and gets himself entered in the schedule of creditors. On the other hand all that a mortgagee decree-holder is called upon to do is to persuade the Company Judge to grant him leave to proceed with his execution. Once he has got the

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leave, his remedy is distinct and separate. He can proceed to realize the mortgage security independently of the winding-up proceedings, and he is not compelled to give up his remedy and submit to any procedure to be dictated by the Company Judge.

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I am, therefore, clearly of opinion that MUKERJI, J., had full jurisdiction in refusing to take it for granted that the mortgage decree obtained by the appellant was a good decree based on valid consideration, and in calling upon the appellant to satisfy him that there was consideration for it before making up his mind to grant leave. At the same time I am bound to say that he could not compel the appellants to submit their proofs to the liquidators and satisfy them that the debt existed, nor had the liquidators any absolute right to examine the appellant's evidence to satisfy themselves that such a debt existed. If the appellants decline to lead any evidence, they run the risk of the learned Judge being influenced by the circumstances that are apparent to him and if he feels that they create a reasonable suspicion in his mind that no real debt existed, he may refuse leave absolutely. The appellants however can refuse to submit their documents to the scrutiny of the liquidators.

I am also of opinion that the Company Judge was not bound to suspend the grant of leave for a limited period only. His refusal may be absolute so as to effectively prevent the decree-holders from executing their decree until the learned Judge himself, in consequence of some additional circumstances, decides to revise his order. I express no opinion on the question whether the present case is or is not a fit case in which leave should have been refused.

On account of a difference of opinion on a point of law the case was then laid before a Bench consisting of BOYS, KING and NIAMAT-ULLAH, JJ., for their "opinion on the question of law raised in the appeal as regards the extent of the jurisdiction vested in the Company Judge under section 171 in the matter of granting leave to a mortgagee decree-holder".

Sir Tej Bahadur Sapru, and Messrs. Peary Lal Banerji, Ajudhia Nath and K. N. Lahiri, for the appellants.



Dr. *Kailas Nath Katju*, for the respondents.

Boys, J.:—This case arises out of an order of Mr. Justice MUKERJI, dated the 9th of July, 1927, made in winding-up proceedings.

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A Letters Patent appeal was filed from that order and came up for hearing before Mr. Justice SULAIMAN and Mr. Justice WEIR. Those two learned Judges were to some extent but not wholly in agreement, and the case has been referred to the present Bench consisting of Mr. Justice KING, Mr. Justice NIAMUT-ULLAH and myself for an expression of our "opinion on the question of law raised in the appeal as regards the extent of the jurisdiction vested in the Company Judge under section 171 in the matter of granting leave to a mortgagee decree-holder." This question I shall redraft presently.

The case has been referred to us for our opinion under clause 27 of the Letters Patent. That clause requires the Judges who have differed to "state the point upon which they differ". In the form in which it has been referred to us we have had to ascertain from the record (there were no less than 10 grounds of appeal), and from the statements of counsel and by comparing the judgement under appeal and the two judgements of the Appellate Bench what exactly was the question which we were invited to answer.

I will briefly state the facts, which in greater detail appear from the judgements of Mr. Justice MUKERJI and Mr. Justice WEIR. After certain preliminary proceedings the present appellants, who had previously given some indecisive indications of their intention to submit their claim to the receiver, put in a definite application on the 12th of April, 1927, asking to be allowed to proceed to execution of a decree which they had obtained on foot of a mortgage. They also asked to be allowed to proceed with a pending suit. But as to this we have

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not been addressed. This action of the appellants has been understood throughout as an intimation of their intention to stand out of the winding-up proceedings and not to submit their claims to proof.

Mr. Justice MUKERJI had in a previous suit, *In re Union Indian Sugar Mills Co. v. Brij Lal* (1), held that he was entitled, if he suspected that the claim was not a just claim, to go behind a decree for damages and in proper circumstances to refuse to allow effect to that decree, and to call upon the creditor to establish before him that he had suffered any damage, and the extent of that damage, and to disallow finally part or the whole of the claim. The decision of Mr. Justice MUKERJI that he had power in the case of a decree for damages to adopt that course was incidentally and generally approved by a Division Bench in *Ram Lal v. Kashi Charan* (2).

In the present case it was contended before Mr. Justice MUKERJI, as set out in his judgement, that "although under section 171 of the Indian Companies Act the decree could not be executed without the permission of the court, yet the granting of the permission was a mere matter of course and should be granted." This position was founded on the fact that in the present case the applicants for leave were in the position of a secured creditor, who had the same rights as a secured creditor of an insolvent individual. It was contended that as a secured creditor the applicants had a right to stand out of the winding-up proceedings altogether, and to proceed as if those proceedings did not exist, with this single exception that they must draw their claims to the notice of the winding-up Judge in order to obtain his mechanical sanction to their proceeding. Mr. Justice MUKERJI did not refer in his judgement to section 28(6) of the Provincial Insolvency Act or to any suggestion that that section was imported into the law regulating

(1) (1927) I.L.R., 49 All., 728.

(2) (1927) 26 A.L.J., 241.

the winding up of companies by section 229 of the Companies Act. I quote the following excerpts from the conclusion of Mr. Justice MUKERJI's judgement:—

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(a) "Having regard to the conduct of Mr. Belti Shah (the managing director) alone I should hesitate more than once before I accepted an *ex parte* decree against the company as a *bona fide* one and above the scrutiny of the Official Liquidators."

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(b) "If the decree be found to be supported by good consideration the applicants may be, if they agree, put down as secured creditors with a first charge on the entire or a portion of the assets of the company, and they may thus be put in the same position in which they would be if they could execute the decree by themselves. However, that is a point which has not arisen for decision."

(c) "After the consideration of the decree has been inquired into it will be time to see whether the decree should be executed by representatives of Lala Raghu Mal or whether the liquidators should pay them, as a first charge-holder, out of the assets of the company or out of such parts of the assets of the company as may have been validly charged by the company."

(d) "I hold therefore that leave to execute the decree should be refused."

I note here that Mr. Justice MUKERJI did not say what course he proposed to adopt if, after the liquidators had had time to consider the merits of the case in which the decree had been obtained, he (Mr. Justice MUKERJI) thought that the decree or part thereof was not supported by consideration in his opinion good.

As the judgement stands it may be that in that event he would continue to refuse leave to proceed to execution of the decree only until the liquidators had had

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time to file a suit to get the decree set aside. On the other hand it may be that he would hold that he was entitled to ignore the decree and himself allow only such part of debt, if any, as he might find to be justly due.

As Mr. Justice MUKERJI's judgement has not definitely stated which of these two courses he would adopt, it was at least open to argument that the appeal from his order, on the main ground on which we are asked to set it aside, is premature.

But it is contended for the appellants that from the statement of Mr. Justice MUKERJI in an earlier portion of his judgement that he was still of the opinion that he has expressed in I.L.R., 49 All., 728, and from the general tenor of the judgment, it was a fair inference that he had held that in the case of this decree obtained by a secured creditor he had the same powers, and meant to exercise those powers, as he had already held himself to be entitled to exercise in the case of the holder of a decree awarding damages.

There is something to be said for this view of the judgement under appeal put by the applicants, and it appears to have been so accepted by the Judges who referred the case to us, and I therefore think it desirable to deal with the question raised in the appeal. Moreover, both Judges were of opinion that an appeal did lie and therefore that question cannot perhaps be considered as being included in the matter for our consideration.

In order to ascertain the exact point upon which our opinion is really required I have analysed and compared the judgements of Mr. Justice WEIR and Mr. Justice SULAIMAN.

Mr. Justice WEIR was apparently of the opinion that the words "the same rules. . . . as are in force for the time being under the law of insolvency" sufficed generally to import the provisions of section 28 and par-

ticularly section 28(6) of the Provincial Insolvency Act, V of 1920, but in so far as the immunity given by section 28(6) to a secured creditor from being required to obtain leave of the court was concerned it could not be availed of in winding-up proceedings in view of the specific provisions in section 171 of the Companies Act. Mr. Justice SULAIMAN was of the view that the word "rules" must be interpreted in the sense of the General Clauses Act, section 3(47), and the use of that word did not suffice to import section 28(6) of the Provincial Insolvency Act. It will be seen, therefore, that, though for different reasons, both the learned Judges were of opinion that section 171 must prevail, and in this respect section 28(6) of the Provincial Insolvency Act would not help the appellants.

Both Mr. Justice WEIR and Mr. Justice SULAIMAN were in agreement that a winding-up Judge has jurisdiction to refuse leave to a secured creditor and were equally in agreement that he has no jurisdiction to order a secured creditor to come in and justify his decree. There is no effective difference, then, in the opinions of the two learned Judges on either of these three, points, nor was there on certain other minor points.

Mr. Justice WEIR further held that the winding-up Judge, while he has jurisdiction to refuse leave, has "jurisdiction" to refuse only temporarily to enable him to decide whether he will (a) direct the liquidator to pay up the decree, or (b) allow the decree-holder to proceed, or (c) direct the liquidator to file a suit to get the decree set aside; that the winding-up Judge has no jurisdiction to refuse leave "absolutely" and thus himself virtually tear up the decree and the mortgage-deed on the foot of which the decree was obtained. Mr. Justice SULAIMAN on the other hand has held that the winding-up Judge has power to refuse leave "absolutely", and

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this would, of course, include the lesser powers which alone Mr. Justice WEIR would allow. It is in this last point that the learned Judges have really differed, and I have, therefore, redrafted the question for our opinion as follows :—

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Where a person has obtained a mortgage (dated the 4th of April, 1923) on the assets, including moveable and immoveable property, of a company, and has obtained what was in effect an *ex parte* decree (dated the 12th of January, 1926), and winding-up proceedings of the affairs of the company have commenced (on the 29th of January, 1926), on which date also a general stay order was passed under section 169 of the Companies Act, and he has applied to the winding-up Judge for leave to proceed to the further enforcement of his security, has the winding-up Judge, if on inquiry he is for any reason satisfied that the claim was not a just one, power under section 169, section 171 or any other section of or rule made under the Companies Act, VII of 1913, to continue the stay absolutely or to refuse absolutely to grant leave; or has he only power so to stay or so to refuse leave temporarily, with a view to determining whether he will direct the liquidator to pay up the decree, or allow the decree-holder to proceed, or direct the liquidator to file a suit?

The phrase "refuse absolutely" may be used for the sake of brevity for that which I should prefer,—“to meet with an unqualified refusal an application for leave to proceed” or “to refuse leave finally and unconditionally”.

My brothers, Mr. Justice KING and Mr. Justice NIAMAT-ULLAH agreed that this is the real question for our consideration.

We have been referred to the following provisions of law by one or other of the counsel :—

The Indian Companies Act, section 169, section 171, sections 228—232 and any other Act, section or rule which may be held to be imported by section 229, more particularly with reference to the Provincial Insolvency Act, V of 1920, sections 28(6) and 47, the rules under the Companies Act, particularly rules 45 to 50 and 104; and the practice and procedure in company matters in England so far as imported by rule 104 of the Indian Companies Act, with more particular reference to the English Companies (winding-up) Rules, 1909, Nos. 88 to 92, 103, 104 and 135.

I shall further refer to sections 2(1)(e), 9(2), 33, 34, 44, 45, 61 and 64 of the Provincial Insolvency Act and rule 21 of the Provincial Insolvency Act Rules and section 183(4) of the Indian Companies Act.

On behalf of the decree-holder appellant's counsel has contended in effect for the view taken by Mr. Justice WEIR. He did not challenge the position that his client must ask for leave to proceed. For the respondent, i.e. for the liquidator, counsel has contended broadly that there is no distinction in winding-up matters between the position of an unsecured and a secured creditor, except possibly to this extent that in the case of a secured creditor the winding-up Judge may, if he so desires, give him permission, if he is satisfied that the debt was a good and just debt, to proceed to enforce his security whether by filing a suit or by proceeding to execution of his decree if he has already obtained one. We were also invited by counsel on both sides to consider the numer-

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ous cases quoted in the judgements of Mr. Justice MUKERJI and Mr. Justice WEIR, together with a few further cases not so mentioned. I will proceed to state as briefly as possible my view.

Boys, J.

On the face of them sections 169 and 171 are wide enough to confer upon the winding-up Judge power respectively to stay all proceedings by a secured creditor and to refuse leave to a secured creditor to proceed. The appellant then relies on section 229. That section provides that in the winding-up of an insolvent company (and in this case there is no doubt about the insolvency). "the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent". The second portion of the section says that "all persons who in such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding-up, and make such claims against the company as they respectively are entitled to by virtue of this section". There was much contention before us as to the meaning of the phrase "the same rules . . . as are in force for the time being under the law of insolvency."

For the liquidator it was contended that the word "rules" must be restricted to the scope given to it by the General Clauses Act, section 3(47). For the appellant creditor it was contended that the phrase is wide enough to include rules contained in the sections of the Provincial Insolvency Act, rules made under any power conferred by that Act and rules of practice.

As to the proper construction Mr. Justice WEIR and Mr. Justice SULAIMAN differed, and though they



Both agreed, though for different reasons, that the secured creditor could obtain no benefit from section 28(6) of the Provincial Insolvency Act, it is still necessary for us to consider which is the correct interpretation, for there are provisions besides section 28(6) to be considered in answering the main question.

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I am of opinion that the contention of the appellant is correct. The section is copied verbatim from the English Act and *prima facie* it would be unjustifiable in such circumstances to restrict the word to a meaning given to it by a purely Indian Act. Again, by rule 104 of the Companies Act the court is instructed to apply "the practice and procedure of the High Court of Justice in England in matters relating to companies". Again, the rule 104 just referred to begins: "In cases not provided for by these rules or by rules of procedure laid down in the Act". That rule itself, therefore, definitely applies the word "rules" to provisions contained in the Act itself. Finally, on the supposition that the word "rules" was to be taken in the sense of rules made under an Act, counsel for the respondent was invited to say to what rules made under an Act relating to insolvency the section referred if his interpretation was accepted. There are some rules made under section 79 of the Provincial Insolvency Act but no rules bearing in any way on the rights of secured and unsecured creditors, and counsel was not able to point to any such and was reduced to acknowledging that if this interpretation of the section was accepted the section was without meaning. I see, therefore, no reason for restricting the word "rules" in section 229 to the narrower sense of "rules made under an Act". I am, therefore, of opinion that the rules contained in any section of the Provincial Insolvency Act, the rules, if any, made under the Act and any appropriate established rules of practice in insolvency proceedings

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are imported into the Companies Act, unless there is something in the Companies Act itself already providing for the matter in question, or in conflict with the rule which it is proposed to import.

Counsel for the respondent next contended that even if the wider meaning must be given to the word "rules" in section 229, the rule by which a secured creditor was given immunity in insolvency proceedings was not intended to be imported but only the rule giving a secured creditor priority. There does not, however, appear to be any justification *prima facie* for admitting the one class of rule and not admitting the other. Moreover it is manifest that the rule giving a secured creditor priority, if and so far as any such rule existed, is not a right given by the law of insolvency.

Counsel was unable to point to any provision in the Insolvency Act or in any rule made under that Act by which priority was given and admitted that the right to priority, in so far as it existed, was given by "the general law". The only relevant sections in the Provincial Insolvency Act and the Companies Act of which I am aware are section 61 in the former and section 230 in the latter, which have no bearing on priority in this connection.

If, therefore, the word "rule" in section 229 is given the wider meaning it is not apparent what rules there are in insolvency to be imported except the rules contained in section 9(2), section 28(6) and section 47 of the Provincial Insolvency Act.

Mr. Justice MUKERJI is also apparently, though he has not discussed the point, of the view that the rules contained in appropriate sections of the Provincial Insolvency Act are imported by section 229, for he refers to and relies on section 34(2) of that Act at page 733 of his

judgement in *In re Union Indian Sugar Mills Co. v. Brij Lal* (1).

If in truth the appropriate sections of the Provincial Insolvency Act are not to be held imported by section 229 we should look in vain for much necessary guidance; e.g. where are we to find the definition of "secured creditor" except in section 2(1)(e) of that Act?

I should also find it surprising if the principles contained in rules made under an Act were imported (so far as appropriate) and not the principles contained in rules made in the Act.

Giving, therefore, the wider meaning to the term "rules" in section 229 I would hold the provisions of section 9(2), section 28(6) and section 47 to be imported, unless there be something in the Companies Act itself either directly substituted for those provisions or something otherwise showing that the importation of those provisions is inappropriate. I agree, therefore, with Mr. Justice WEIR's interpretation of section 229.

As to whether it is necessary for a secured creditor to apply at all for leave to proceed, it is not necessary for me to express an opinion since both the learned Judges were, though for different reasons, of one opinion that leave must be applied for.

The next and main question is, what, if any, are the special rights of a secured creditor?

Section 229 bears on the face of it a reference to "the respective rights of secured and unsecured creditors." The phrase is in itself sufficient to show that the Legislature recognized a difference between the rights of the two classes of creditors. In view of what I have said above as to the scope of section 229 I see no reason for excluding from importation into winding-up proceedings

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the broad established and admitted principle of insolvency law in the case of insolvency of an individual,—that a secured creditor can stand outside the proceedings, as evidenced by, amongst other sections, section 9(2), section 28(6) except so far as getting leave is concerned (as to which both the learned Judges of the Division Bench were in agreement) and section 47, and as evidenced by the prevailing practice.

In this connection I note that rule 104 of the Indian Companies Act Rules of this Court authorizes this Court to be guided by the practice and procedure of the High Court of Justice in England in matters relating to companies so far as they are applicable and not inconsistent with these rules and the Act. Turning to the English "Companies winding-up Rules, 1909", we find rule 135 which was incidentally referred to by counsel for the appellant. That was a rule in reference only to the matter of voting, but it contains the phrase "a secured creditor shall, unless he surrenders his security, state . . .". With this may be compared "where a secured creditor relinquishes his security" in section 47 of the Provincial Insolvency Act, and the similar phrase in section 9(2). It is clear, then, that the situation is in all three cases contemplated that a secured creditor may choose not to surrender his security. I should find it difficult to reconcile the two positions that a creditor may decide not to surrender his security, while at the same time a winding-up Judge may throw that security aside and examine into the justice of the debt exactly as if no security had ever existed. Nor has any principle been suggested to us or suggested itself to me why a secured creditor should be allowed to stand out in the case of the insolvency of an individual and not in the insolvency of a company.

On the other hand I find no difficulty in reconciling the two positions, that a secured creditor can stand on

his security but that he must obtain leave to proceed, when we bear in mind the purpose with which the provision in section 171 was enacted. In reference to the similar provision in section 87 of the English Act of 1862 it was pointed out by JAMES, L. J., in *David Lloyd and Co.* (1), that the object was to enable the winding-up Judge to prevent a multiplication of costs to the detriment of the estate and not to enable him to interfere with "the property" of the mortgagee.

Counsel for the liquidator was driven to contend that no difference is made between a secured and an unsecured creditor and he referred to rules 47 to 53 and rule 104 of the Indian Company Rules and rule 103 of the English Rules. I shall refer by a general observation to these rules later, but a sufficient answer to the broad statement of counsel is that section 229 on the face of it shows that there is a difference in the rights of the two classes. And if indeed there be no difference between the rights of a secured and an unsecured creditor in the matter of their being liable to be called upon to prove their claims and secure entry on the schedule, what, in view of the provisions of section 61(5) of the Provincial Insolvency Act and section 183(4) of the Companies Act, becomes of the right to priority which at another stage of the argument for the liquidator it was admitted and contended the secured creditor had?

Counsel was further driven to urge that a creditor claiming to be a secured creditor is not a "secured creditor" at all until he has "proved" his security. To this the definition of "secured creditor" in section 2(1)(e) of the Provincial Insolvency Act is a sufficient answer. In fact even an unsecured creditor, in order to secure acceptance of his claim, does not necessarily have to do more than send it in under rule 45, which sending in would appear to be equivalent to the state which is des-

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(1) (1877) 6 ch., W., 339.

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cribed as "notifying" in section 64 of the Provincial Insolvency Act; even such a creditor need not "prove" unless called upon (vide rule 46).

In this connection I note the phraseology of the second part of section 229,—“all persons who would be entitled to prove . . . may come in.” The word “provable” as used in the Provincial Insolvency Act does not in my opinion mean “which must be proved”, but “capable of proof” or “which may be, i.e. are allowed to be, proved”. To appreciate this meaning of “provable under this Act” in section 28(2), section 33(1) and (3), section 44(2), etc. we must look at sections such as the proviso to section 33(1), section 34(1) and section 45.

But of course the real question of importance is whether “provable under this Act” read with section 64 means that in the case of all creditors, secured as well as unsecured, if they do not choose to come in (rule 45) and prove if called upon to do so (rules 46 to 49) they will lose their claims. That this is not so in the case of secured creditors, in the sense that they must, if called upon to do so, satisfy the winding-up Judge that their security is for a just debt, is clear from section 47 of the Provincial Insolvency Act, the language of which is consistent only with the idea that the secured creditor need not prove at all if he relies on realizing his security.

Here I may note an indication from rules 135 and 136 of the English Company Rules under which, when a secured creditor himself wishes to prove for the purpose of voting, he puts his own value on his security and not the value which the liquidator may choose to allow.

All the rules either in the Indian Companies Act or in the English Company Rules quoted to us on behalf of the respondent relating to the necessity of proof and which it is suggested are of general application are entirely

consistent with the view that they apply only to those creditors who are unsecured or, where they specifically refer to secured creditors, to those secured creditors who have given up their security or who, having endeavoured to obtain satisfaction, have only succeeded in obtaining satisfaction in part and claim to prove for the remainder.

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It is not, therefore, necessary to consider how far such rules as Nos. 88, etc. of the English Company Rules (or rule 21 under the Provincial Insolvency Act which was not, however, mentioned for the respondent) are imported at all by the Indian Companies rule 104 when there are Indian Companies rules (e.g. rule 45, etc.), dealing with the same matters.

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Similarly there is nothing in *Kashi Prasad v. Union Bank of India* (1), quoted for the respondent, to show that the decree was a mortgage decree or that any question of the rights of a secured creditor arose at all.

I have not considered it necessary to consider in detail the English cases to which reference has been made. It is admitted on all sides that not one of the cases, whether English or Indian, suggests that the winding-up Judge can compel a secured creditor to come into the winding-up proceedings or in any way submit his claim to scrutiny. In cases such as *In re Van Laun, Ex parte Chatterton* (2), it is clear that the secured creditor had exercised his option to come into the winding-up proceedings and submit his claim to the winding-up Judge. They are no authority for the proposition that the Judge has power to compel him to come in.

The fact that there are no cases in which it has been held that a winding-up Judge can compel a secured creditor to bring in his security and that he can scrutinize that security and, if he sees fit, in effect tear it up, and no cases in the opposite sense, suggests that the prac-

(1) (1919) I. L. R., 41 All., 432.

(2) [1907] 2 K. B., 23.



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tice in England and in this country has been uniform in one direction or the other and has been regarded as not open to question. This uniformity of practice suggests the following consideration. If the practice has been uniform in favour of the secured creditor it would be natural to find that the question of his privilege had never been raised. On the other hand if the practice had been in a sense adverse to the secured creditor it is almost certain that that practice would be found to have been confirmed by some judicial decision or decisions, for it is almost certain that some secured creditor would at one time or another, on the strength of the law and practice applying to bankruptcy proceedings, have challenged the power of the winding-up Judge. So far, therefore, as any conclusion can be drawn from the absence of any judicial authority either way, that conclusion must be in favour of the secured creditor.

If it be asked why a secured creditor should ever desire to come into the winding-up proceedings, it is manifest that there may be cases in which he may feel that his chances of realizing his money in good time, if he depends solely on his security, may possibly be jeopardized if he stands aloof from the winding-up proceedings altogether and allows them to arrive at a termination before he has realized his security.

Finally I would note that it would in my view be surprising indeed if the Legislature had meant by language merely requiring leave to be obtained to confer power to tear up a decree and also the security upon which it was founded.

In my view our answer must then be guided by the two considerations, the winding-up Judge has jurisdiction to refuse leave but his discretion to refuse leave must be exercised "with a due regard to the rights of third persons who were not members of the company and



who had not to come in and claim to share . . . such as a mortgagee" (Per JAMES, L. J., in *David Lloyd and Co.* (1).

To say that the discretion is thus limited is in effect to place a restriction on the exercise of his jurisdiction by the winding-up Judge, but that is no more than the English Courts have found it necessary to do.

It is clear that in any case the orders of the winding-up Judge staying proceedings under section 169 and refusing leave under section 171 cannot be operative any longer than the winding-up proceedings continue; and further it is very difficult to conceive an unqualified refusal to give leave which would not infringe on the rights of the secured creditor. Ordinarily, for a winding-up Judge to say to a secured creditor that the merits of his claim are so dubious that leave to proceed is unconditionally and finally refused is going perilously near permitting him to adjudicate on the merits of the claim. It may not be in form an adjudication but it is a judicial pronouncement and it may have a serious repercussion on the right of the secured creditor to an unprejudiced trial of his claim and also it may induce a purchaser to pay an enhanced price under what may prove to have been a false impression of security created by the action of the Judge. But there may possibly, in very exceptional circumstances, be a case in which unqualified refusal would be upheld and it may be that JESSEL, M. R., (with whom JAMES, L. J., and COTTON, L. J., expressed their agreement) had this possibility in mind when he held in the case to which I have just referred that those who desire to restrain a secured creditor from proceedings must offer to pay him off or show some special grounds for restraining him.

(1) (1877) 6 Ch. D., 359 (345).

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I would state the following propositions:—

(1) That no secured creditor need, or can be forced to, prove his debt, and that, with the next following exception, such a creditor can stand wholly outside the winding-up proceedings if he so elects and rely upon his security or his decree if he has obtained one.

(2) That every secured creditor must obtain leave to proceed from the winding-up Judge.

(3) That the winding-up Judge has jurisdiction to refuse leave absolutely.

(4) That the winding-up Judge has not jurisdiction, under colour of refusing leave or otherwise, to annul or modify a secured creditor's security or decree.

(5) That, while there may be some exceptional case in which the winding-up Judge may refuse leave absolutely, he should ordinarily refuse leave only for such time as may be necessary to enable him in the particular circumstances of each case to determine whether he will direct the liquidator to pay off the claim and thus save unnecessary costs to the estate or whether he will give leave to proceed, or whether he will direct the liquidator to take such steps as may be open to him to get the decree set aside.

Where the secured creditor has not yet obtained a decree an alternative consideration may arise as to whether the winding-up Judge will direct the liquidator to apply to be made a party to any proceeding that the creditor may have instituted or desire to institute, but we have not been called upon to deal with that.

KING, J. :—I fully agree to the views expressed by Boys, J., and have only one comment to make.

The language of section 228 of the Indian Companies Act, 1913, seems to me to furnish an additional argument

for the view that the word "rules" in section 229 is not to be construed as having only the narrow meaning given to that word by section 3(47) of the General Clauses Act, 1897.

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In section 228 we find that the law of insolvency is to be applied "in accordance with the provisions of this Act" to the winding up of insolvent companies. It must be noted that the expression used is "law of insolvency" and not "rules which are in force under the law of insolvency."

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Now there is no provision of the Companies Act which expressly applies the "law" of insolvency to insolvent companies. Section 229 does, however, provide that "rules" which are in force, on certain subjects, under the law of insolvency shall be observed in the winding up of insolvent companies. Section 229, therefore, undoubtedly appears to be the provision of the Act which is mentioned in section 228 as applying the "law" of insolvency to insolvent companies. This leads me to conclude that the Legislature did not intend to draw a distinction between "the law of insolvency" (mentioned in section 228) and "the rules in force under the law of insolvency" (mentioned in section 229). This implies that the word "rules" in section 229 must be liberally construed in the sense of "rules of law" including (a) provisions of the Insolvency Act, (b) rules made under that Act, and (c) rules of practice.

NIAMAT-ULLAH, J. :—I agree with BOYS, J., to the answer he proposes to make on the question referred to the Full Bench and would add a few observations in support of his conclusions and to emphasise some aspects of the case on which they rest.

The facts of the case, so far as they are necessary to make my remarks intelligible, are briefly as follows :—

The appellants Lala Hansraj and others obtained, on 28th October, 1924, an *ex parte* decree for sale, passed by

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a learned Judge sitting on the Original Side of the Calcutta High Court, for a large sum of money (about Rs. 1,77,000) on foot of a mortgage deed, dated the 25th of April, 1923, executed by the Dehra Dun Mussoorie Electric Tramway Co. Ltd., which has since gone into liquidation and is being wound up by Mr. Justice MUKERJI, a learned Judge of this Court. Inasmuch as no legal proceedings can be taken except by leave of the Court, i.e., the Judge exercising jurisdiction under the Indian Companies Act (section 171), the appellants applied for leave to take out execution of their decree. Mr. Justice MUKERJI held that the leave "to execute the decree should be refused." His order, which has been quoted by Mr. Justice BOYS in the leading judgement, has been construed to mean, and the case has been argued on the assumption, that he ruled, in effect, that after scrutinizing the claim of the appellants under their mortgage deed and the decree obtained by them the learned Judge should decide what amount of money, if any, is due to them and what part of the company's assets should be charged therewith; or whether the decree should be allowed to be executed. On appeal from this order the learned Judges composing the Division Bench which heard it, disagreed on a question of law. Mr. Justice SULAIMAN held that the learned Company Judge had the jurisdiction to refuse leave "absolutely" and "was not bound to suspend the grant of leave for a limited period only." He added "I express no opinion on the question whether the present case is or is not a fit case in which leave should have been refused." Mr. Justice WEIR, the other learned Judge of the Division Bench, maintained that "since the appellants have refused to submit their claims to the scrutiny of the liquidators, MUKERJI, J., has no jurisdiction to attempt to force them to do so; though I think that he can stay the execution of the decree for a reason-

able period of time in order to enable the liquidators to make up their minds whether they will or will not take other steps to attack the decree. It seems to me that the power to stay execution of a decree, such as this, in a case like the present is limited to the extent which I have indicated". He ordered accordingly that the execution of the decree be stayed for six months.

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Mr. Justice BOYS has laid down, after a careful analysis of the judgements of the learned Judges composing the Division Bench, what question ought to be decided by this Full Bench, and it seems to me that the difference of opinion between those learned Judges reduces itself to the question whether the jurisdiction of the court refusing leave to a mortgagee decree-holder to execute his decree extends to the power to refuse leave altogether and it is only a matter of his discretion to refuse for a limited time or altogether, as Mr. Justice SULAIMAN thinks, or whether his jurisdiction in that behalf is limited to such time as may be reasonable to enable the liquidator to decide if he should attack the decree by instituting a regular suit, as Mr. Justice WEIR would have it.

That a secured creditor need not prove his debt in winding-up proceedings and can stand wholly outside such proceedings relying on his security is conceded by both learned Judges of the Division Bench. Mr. Justice WEIR has quoted a number of English decisions in support of this view. Mr. Justice SULAIMAN, though he does not consider that any of the sections of the Provincial Insolvency Act are imported into the provisions of the Indian Companies Act by section 229 of the latter Act, has nevertheless expressed himself as follows:—"Although there is no express provision in the Companies Act protecting secured creditors, their safety rests on well established principles. Under the Transfer of Property Act an interest is transferred to a mortgagee. A mortgagee's estate, so to speak, is carved out of the original estate and vests in

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the mortgagee. When a company is in liquidation, only the property of the company comes under the control of the court or the official liquidator. The interest which has previously passed to a mortgagee is separate and distinct and is not brought in. It follows that a mortgagee with his well defined interest can keep aloof and remain outside the jurisdiction of the court. His remedy to realize his security would ordinarily be unaffected by the insolvency of his debtor. He cannot against his will be dragged into the winding-up proceedings, or compelled to surrender his security and place himself on the same footing as other creditors by proving his debt. His rights are paramount and remain safe. Of course if he so chooses he may realize his security and prove for the balance, or he may surrender his security and prove for the whole debt; but he cannot be forced into doing that or to abandon his remedy. The liquidators may redeem the mortgage but cannot prevent him from selling the mortgaged property."

We find no provision in the Indian Companies Act conferring jurisdiction on the court to adjudicate, in winding-up proceedings, on the right of third persons whose claims come in conflict with the rights of the company. The only provisions which relate to such third persons are contained in sections 231 and 232 of the Indian Companies Act which run as follows :—

"231. (1) Any transfer, delivery of goods, payment, execution or other act relating to property which would, if made or done by or against an individual, be deemed in his insolvency a fraudulent preference, shall, if made or done by or against a company, be deemed, in the event of its being wound up, a fraudulent preference of its creditors, and be invalid accordingly.

(2) For the purposes of this section the presentation of a petition for winding up in the case of a winding up

by or subject to the supervision of the court, and a resolution for winding up in the case of a voluntary winding up, shall be deemed to correspond with the act of insolvency in the case of an individual.

(3) Any transfer or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void."

"232. (1) Where any company is being wound up by or subject to the supervision of the court, any attachment, distress or execution put in force without leave of the court against the estate or effects of the company after the commencement of the winding-up shall be void.

(2) Nothing in this section applies to proceedings by the Government."

It will be seen at a glance that sections 231 and 232 of the Indian Companies Act are parallel to sections 53 and 54 of the Insolvency Act, but it is significant that there is no provision in the Indian Companies Act corresponding to section 4 of the Provincial Insolvency Act which lays down:—

"(1) Subject to the provisions of this Act, the court shall have full power to decide all questions whether of title or priority, or of any nature whatsoever, and whether involving matters of law or of fact, which may arise in any case of insolvency coming within the cognizance of the court, or which the court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case.

(2) Subject to the provisions of this Act and notwithstanding anything contained in any other law for the time being in force, every such decision shall be final and binding for all purposes as between, on the one hand,

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the debtor and the debtor's estate and, on the other hand, all claimants against him or it and all persons claiming through or under them or any of them.

(3) Where the court does not deem it expedient or necessary to decide any question of the nature referred to in sub-section (1), but has reason to believe that the debtor has a saleable interest in any property, the court may without further inquiry sell such interest in such manner and subject to such conditions as it may think fit."

It follows from the foregoing remarks and the provisions quoted that a winding-up court, unlike an insolvency court, cannot take cognizance of and adjudicate on the title of third persons except to the limited extent mentioned in sections 231 and 232 of the Indian Companies Act, and if it is necessary to impeach such title, the liquidators must have recourse to regular suits cognizable by ordinary civil courts. A mortgagee or a secured creditor, *qua* the interest which has been transferred to him by the mortgage or hypothecation, is not a mere creditor but a person in whom the right is vested, and his right can be impeached, if at all, in the same manner as in the case of any other person who claims adversely to the company.

It has been said that a claimant, to occupy the advantageous position of a secured creditor, should establish before the court in winding-up proceedings the fact that he is a secured creditor. I do not think that any occasion can arise for his doing so. A person claiming to be a transferee of an interest, be he a vendee, donee or mortgagee, can establish it when he desires to enforce his claim and can defend his title if it is attacked before a competent court. Meanwhile, the liquidator is to take note of it in dealing with what he thinks to be the property of the company. The right claimed by a secured



creditor may be so palpably illusory that he feels justified in ignoring it and in assuming that the claim will not appreciably influence intending purchasers of the company's property affected by such adverse claim. In other cases the liquidator must either accept it or have the cloud on the title of the company removed by obtaining appropriate relief from a competent court.

Wherever a mortgagee or other secured creditor has already obtained a decree against the company in enforcement of his claim, it affords an additional strength to his title and can be questioned by the liquidator on the usual grounds such as fraud or collusion. Mr. Justice SULAIMAN is inclined to think that, as between the liquidator on the one hand and the mortgagee decree-holder on the other, the binding character of the decree is to be judged with reference to the rule of *res judicata* contained in section 11 of the Code of Civil Procedure, and that the former, being an officer of the court and representing the interest of the whole body of creditors as well as those of the shareholders, is not bound by the decree. I take leave to point out that before the rule of *res judicata* can be invoked by one or the other of the parties to determine the binding character of the decree, there must be an issue in a suit or proceeding in a competent court between the parties, and in so far as such an occasion does not arise before a court in winding-up proceedings there is no room for the application of the rule of *res judicata*. Such an occasion will, of course, arise when the mortgage or the decree is in question in a regular suit brought by the liquidator to challenge the mortgage or the decree or in any proceedings taken by the mortgagee to realise his security. I doubt if in such a case the liquidator can get over the bar of *res judicata* by an appeal to his position as a representative of the creditors generally. *Prima facie* he will, in that contingency, occupy no higher

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position than the one which an attaching creditor does under similar circumstances. It is, however, unnecessary to express a decisive opinion on this question.

The next question is whether section 171 of the Indian Companies Act, which unquestionably subjects a secured creditor to a disability in enforcing his claim as he must obtain leave of the winding-up Judge to institute a suit or to execute a decree if he has already obtained one, confers an unlimited power on the winding-up Judge to refuse leave. The jurisdiction of the court is not limited by anything contained in that section which confers the widest power to refuse leave. It does not make it obligatory on the court to withhold leave in any given case for a limited time only. At the same time it can be confidently expected that the unlimited power to refuse leave will be exercised by a court of law in furtherance of the ends of justice and not capriciously. No court will so abuse it as to hold it *in terrorem* to induce the secured creditor to forego part of his claim or otherwise compromise his position. If the court is obdurate in refusing leave to a secured creditor without directing the liquidator to challenge his rights in a proper court and abide the result, it will cause incalculable harm to the interests of the company and the creditors. It cannot, by merely withholding leave, extinguish the charge, if it otherwise exists, or deprive the decree of its operative effect. The charge will subsist though it cannot be enforced during winding-up proceedings. Whoever purchases the property subject to such charge will purchase encumbered property liable to be sold in the hands of the purchaser, as, it should be noticed, leave is necessary only for a "suit or other legal proceeding . . . against the company." Once it is possible to avoid proceeding against the company, the secured creditor is free from the trammels of section 171, Indian

Companies Act. A prospect of this kind, and fear of future litigation, are likely to deter purchasers from offering anything like a fair market value of the property which a secured creditor claims to be burdened with his debt. It should be observed that limitation for the secured creditor's suit or application for execution, as the case may be, will remain suspended under section 15, Limitation Act. No court winding up the affairs of a company will, therefore, ordinarily consider it safe to withhold leave altogether and to court the disastrous consequences likely to follow its action. Cases are, however, conceivable in which the court may safely refuse leave altogether. The claim of a secured creditor may be so manifestly baseless as not to weigh with it and with the intending purchasers who may be willing to offer full value for the property, confidently relying on their ability to defeat the claim when made. In such a case the court may deem it desirable to withhold leave absolutely and to dispense with the necessity of the liquidator instituting a suit to vindicate the title of the company. In practice cases of this kind will be of rare occurrence but are not beyond the range of possibility. The Legislature did not consider it expedient or even possible to lay down exhaustively cases in which and the purposes for which leave should be granted and those where it should be refused. Unlimited jurisdiction has been, therefore, conferred by section 171 of the Companies Act on the winding-up Judge, to withhold leave for such time and on such terms or altogether as the circumstances of each case may warrant.

Where the Legislature has advisedly conferred jurisdiction or power on a court without imposing any fetters thereon, it cannot be limited by enumerating cases in which alone it can, in our present view, be exercised. It will be tantamount to adding a proviso to section 171

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of the Indian Companies Act, which the Legislature has not thought fit to add.

"By jurisdiction is meant the authority on which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted or may be extended or restricted by the like impositions. If no restriction or limit is imposed, the jurisdiction is said to be unlimited; a limitation may be either as to the kind and nature of the actions and matters of which a particular court has cognizance, or as to the area over which the jurisdiction shall extend, or may partake of both these characteristics." (See Halsbury's Laws of England, volume IX, page 13, paragraph 10).

Numerous cases have arisen with reference to section 115 of the Civil Procedure Code in which a distinction has been drawn between absence of jurisdiction and erroneous exercise thereof. It was observed by their Lordships of the Privy Council in *Amir Hassan Khan v. Sheo Bakhsh Singh* (1): "The question then is, did the judges of the lower courts in this case, in the exercise of their jurisdiction act illegally or with material irregularity? It appears that they had perfect jurisdiction to decide the question which was before them and they did decide it. Whether they decided it rightly or wrongly, they had jurisdiction to decide the case; and even if they decided wrongly they did not exercise their jurisdiction illegally or with material irregularity."

If therefore a winding up Judge has jurisdiction to grant leave or not and he withholds it altogether he cannot be said to have acted without jurisdiction even

(1) (1884) 1 L. R., 11 Cal., 6.

when he erroneously disregarded the rights of a secured creditor.

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The dictum of their Lordships of the Privy Council in *Rajwant Prasad Pande v. Ram Ratan Gir* (1) that "it is very trite and very familiar that a challenge of the method of the exercise of the jurisdiction of a court can never in law justify a denial of the existence of such jurisdiction" has a peculiar bearing on the question which is engaging our attention. If a winding-up Judge refuses leave to a secured creditor without the slightest justification "his method of the exercise of the jurisdiction" may be erroneous, but his jurisdiction cannot be questioned.

An order passed without jurisdiction is a nullity, and therefore one of the tests of an order being without jurisdiction is to find if it can be treated as not possessing a binding effect. Can the order of a winding-up Judge refusing leave absolutely be regarded as a nullity? Can it be ignored after a reasonable time such as may be considered sufficient to enable the winding-up Judge to decide what steps should be taken with reference to the claim of the secured creditor? I have no doubt as to the answers to these questions. If a winding-up Judge has no jurisdiction to refuse leave without specifying a reasonable time, that order ought to cease to have binding effect after a reasonable time. It seems to me that there is a contradiction in terms in the proposition that a Judge has no jurisdiction to refuse leave for all time but can refuse leave for such length of time as he considers reasonable. If the length of time for which he can withhold leave rests with him, he can refuse it absolutely and altogether according to the latter part of the proposition, a power which the first part thereof professes to deny.

For the reasons I have stated, I answer the ques-

(1) (1915) I. L. R., 37 All., 485 (494-495).

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tion referred to the Full Bench in terms set out in the judgement of BOYS, J.

By THE COURT:—Let the case be returned to the Division Bench hearing the appeal with the following expressions of opinion:—

- (1) That no secured creditor need, or can be forced to, prove his debt, and that, with the next following exception, such a creditor can stand wholly outside the winding-up proceedings if he so elects and rely upon his security or his decree if he has obtained one.
- (2) That every secured creditor must obtain leave to proceed from the winding-up Judge.
- (3) That the winding-up Judge has jurisdiction to refuse leave absolutely.
- (4) That the winding-up Judge has not jurisdiction, under colour of refusing leave or otherwise, to annul or modify a secured creditor's security or decree.
- (5) That, while there may be some exceptional case in which the winding-up Judge may refuse leave absolutely, he should ordinarily refuse leave only for such time as may be necessary to enable him in the particular circumstances of each case to determine whether he will direct the liquidator to pay off the claim and thus save unnecessary costs to the estate or whether he will give leave to proceed, or whether he will direct the liquidator to take such steps as may be open to him to get the decree set aside.

## APPELLATE CRIMINAL.

Before Sir Grimwood Mears, Knight, Chief Justice,  
and Mr. Justice Young.

EMPEROR v. ISMAIL AND OTHERS.\*

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February, 18.

Act (Local) No. IV of 1910 (U. P. Excise Act), sections 60(a) and 71—"Possession"—House occupied by several persons—Nature of occupation—"Actual offender"—Exemption from imprisonment.

Under section 60(a) of the U. P. Excise Act, IV of 1910, ownership of the house is not an essential element, but the nature of the occupation of the house is often a circumstance of great importance in estimating whether the particular accused was in possession of the excisable article.

Cocaine was found in a *degchi*, into which it had been recently thrown, in a house in which two brothers and a cousin, who carried on a common business, lived together. All three were in the room when the cocaine was found, and all of them tried to account for its presence by the false allegation that they saw a constable throw it into the *degchi*. Held that each of the three persons came within section 60(a), as being in possession of the cocaine.

The proviso in section 71 of the Act does not in any way modify the effect of section 60(a), which provides that a person in possession of cocaine may be punished with imprisonment which may extend to two years. The proviso as to punishment by fine applies only to that person who is able to show that he is the employer or principal, that he did not personally commit the act complained of and that he took all due and reasonable precaution to prevent the commission of such act by the employee or agent.

*Abdul Rahman v. Emperor* (1), distinguished.

\* Criminal Appeal No. 936 of 1928, by the Local Government, from an order of Rup Kishan Agha, Additional Sessions Judge of Allahabad, dated the 24th of August, 1928.

(1) (1928) 26 A. L. J., 414.

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The Government Advocate (Mr. U. S. Bajpai), for the Crown.

Mr. G. K. Shinde, for the respondents.

MEARS, C. J., and YOUNG, J. :—This is an appeal by the Local Government against the acquittal by the Sessions Judge of Allahabad of Ismail and Ishaq, sons of Husain Bakhsh, and Abdul Razzak, son of Abdul Ghafur, on a charge under section 60 (a) of Act IV of 1910, Excise Act.

Ismail and Ishaq are brothers and Abdul Razzak is their cousin. The three men had been living together for a considerable time in a house at Gulab Bari, and carrying on business together. On the 2nd of April, 1928, their house was raided by the police and 10 small and one large packet of cocaine hydrochlorate were found in a room in which they were all present. The cocaine was enclosed in paper, and the packets were found partly submerged in water, having been thrown into a *degchi* a few moments before their discovery, as was evidenced by the fact that the cocaine which had come in contact with water had not dissolved. The only explanation given at the moment was a general statement that the cocaine must have been planted there.

Before arriving at the house Mr. Measures, Superintendent of Police, had his party searched as also the search witnesses, and was himself searched. Later when the Magistrate was examining the premises in the presence of the three accused, they set up a story that they saw a constable, who entered with others by another door, throw the packets of cocaine into the *degchi*. Apart from the difficulty of this feat, there is the significant circumstance that they did not at once denounce the constable in the presence of Mr. Measures, when each of them had seen him do it with their own eyes. The search was concluded without this most important circumstance ever having been mentioned to Mr. Measures



or anybody. The only inference we can draw is that it never happened but was an invention thought out afterwards.

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Section 60 runs as follows: "Whoever, in contravention of this Act, (a) possesses any excisable article . . . . shall be punished, if the offence is committed in respect of cocaine, with imprisonment which may extend to two years or with fine or with both."

Section 71 must also be considered in this connection:—"In every prosecution under section 60, it shall be presumed, until the contrary is proved, that the accused person has committed an offence punishable under that section in respect of any excisable article . . . . for the possession of which he is unable to account satisfactorily."

There is a further point about section 71, which we will touch on in due course.

Therefore, the prosecution had to prove under section 60 (a) that these three men were in possession of the cocaine. We must consider the circumstances and their conduct. As we have already said, they are closely related. They have been living together for some time. They carry on the common business. Not one of the three ever disassociated himself from the others in any respect. All were in the room at the moment of the raid. One or some of them undoubtedly threw the paper packets into the *degchi*. They set up a common defence, which was that each of them had seen a constable himself throw the packets into the *degchi*. We think that these facts when taken together are sufficient to bring each of these three men within section 60 (a) as being in possession of the excisable article. They have entirely failed to discharge the obligation cast upon them by section 71 of accounting satisfactorily for its possession.

In both of the lower courts a good deal of discussion turned upon the question of the ownership of the house.

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Under section 60 (a) ownership of the house is not an essential element, but the nature of the occupation of the house might and often is a circumstance of very great importance in estimating whether the particular accused in any given case possesses the excisable article, and indeed it has had great weight in this case. A simple illustration will show the importance of the matter. If the police, having raided a room, found three people in it, and at the bottom of a drawer wrapped away in cloth found a packet of cocaine, the fact that two only of the three men lived in that room whilst the third was merely a casual visitor, would be a matter well worthy of consideration. The probability is that the place where the cocaine was found would tell seriously against the two occupiers of the room, and would tell considerably in favour of the visitor. We have come to the conclusion that the prosecution have made out their case, and that each of these three men was what is described in section 71 as the "actual offender", that is the person in possession of an excisable article, for the possession of which he was unable to account satisfactorily.

It has been urged upon us that the learned Magistrate would have passed a sentence of imprisonment upon each of the three men had he not felt himself bound by the decision in the case of *Abdul Rahman v. Emperor* (1). That case apparently proceeded on the basis of the man being the owner of the house. This case proceeds upon the actual possession by the accused, and we have no doubt that the Magistrate could have passed a sentence of imprisonment had he thought fit to do so. There is in section 71 a proviso that no person other than the actual offender shall be punished with imprisonment except in default of payment of fine. We are of opinion that that proviso in section 71 does not in any way modify the effect of section 60 (a), which provides that a

(1) (1928) 26 A. L. J., 414.

person in possession of cocaine may be punished with imprisonment which may extend to two years. The latter part of section 71 recognizes a set of circumstances which not infrequently arise where the owner of a business, which is hemmed in with statutory restrictions, has necessarily to carry on that business by means of managers, assistants and agents. An assistant may commit an act in direct violation of, say for instance, the licensing laws, of which the proprietor may be wholly ignorant. The assistant in such instance is the "actual offender". No difficulty should arise in the construction of this section, because the court can ask itself on each occasion whether it is dealing with a man who is the actual offender, or a man who sets up the defence that he himself had no knowledge of any wrong-doing, and that such wrong-doing (if committed) was committed by some person in his employ or acting on his behalf, and that he himself had taken all due and reasonable precaution to prevent the commission of such offence.

The proviso as to punishment by fine applies in our opinion only to that person who is able to show that he is the employer or principal, that he did not personally commit the act complained of, and that he took all due and reasonable precaution to prevent the commission of such act. The actual offender is of course the person who commits the particular breach of the law.

Whilst we have no doubt that we could inflict upon each of these three accused the punishment of imprisonment, we, however, think the fines imposed by Mr. Azimuddin Khan a sufficient penalty. We set aside the order of Mr. Rup Kishen Agha of the 24th of August, 1928, and restore the convictions and sentences of Mr. M. Azimuddin Khan of the 11th of June, 1928. The accused will therefore each pay Rs. 100 as fine, and in default of fine will each undergo rigorous imprisonment for three months.

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## APPELLATE CIVIL.

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February, 18. Before Mr. Justice Sen and Mr. Justice Niamat-ullah.  
ABDUL AZIZ (JUDGEMENT-DEBTOR) v. ABDUL RAHIM  
(JUDGEMENT-DEBTOR) AND SHAHIDAN BIBI AND OTHERS  
(DECREE-HOLDERS).\*

*Civil Procedure Code, section 47—Question between judgment-debtors inter se—Dispute as to the order in which several properties are to be sold—Question relating to execution, discharge or satisfaction of decree.*

Per SEN, J., (NIAMAT-ULLAH, J., *dubitante*):—A dispute between two judgment-debtors *inter se* as to the order in which the properties belonging to each, respectively, are to be sold in execution of a decree for sale on a mortgage is not a question arising "between the parties" within the meaning of section 47 of the Civil Procedure Code.

Per NIAMAT-ULLAH, J. :—The question whether an order deciding such a dispute by imposing certain conditions, on the fulfilment of which the properties would be sold in a certain order, is justifiable is not a question relating to "the execution, discharge or satisfaction of the decree" within the meaning of section 47 of the Civil Procedure Code.

The view that section 47 can, under no circumstances, apply to a question as between two judgment-debtors *inter se* is not free from doubt. The words "between the parties" do not imply that such parties must have been arrayed as plaintiff and defendant. If the scope of the section is narrowed down only to cases in which questions, relating to execution, discharge or satisfaction of the decree, arise between the decree-holder and the judgment-debtor, the very object underlying that section may be frustrated.

*Raynor v. The Mussoorie Bank, Ltd.* (1), *Anandi Kunwari v. Ajudhia Nath* (2), *Bhagwati v. Banwari Lal* (3) and *Vedaviasa Aiyar v. The Madura Hindu Labha Co., Ltd.*, (4), referred to.

\* Second Appeal No. 322 of 1928, from a decree of Ganga Prasad Varma, Second Additional Subordinate Judge of Gorakhpur, dated the 16th of January, 1928, confirming a decree of M. M. Seth, City Munsif of Gorakhpur, dated the 27th of August, 1927.

(1) (1885) I.L.R., 7 All., 681.

(2) (1908) I. L. R., 30 All., 379.

(3) (1908) I. L. R., 31 All., 82.

(4) [1924] A. I. R., (Mad.), 365.

Dr. M. Wali-ullah, for the appellant.

Mr. Sankar Saran, for the respondents.

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SEN, J. :—This is an appeal by a judgement-debtor and it arises out of the following facts.

One Abdul Rahim executed a simple mortgage in favour of the Kayastha Trading and Banking Corporation for Rs. 600, which was payable in two years. The property hypothecated consisted of three houses and the rate of interest agreed upon was one rupee per cent. per mensem, at six monthly rests. The mortgagee assigned the mortgage to one Shamsuddin on the 19th of March, 1915. Abdul Rahim sold one of the mortgaged houses to Abdul Aziz, the appellant, on the 14th of June, 1918, for a sum of Rs. 1,100, out of which Rs. 601 were left with the vendee for payment of the mortgage debt in part. This payment was not made. Shamsuddin having died, his heirs, namely Musammat Shahidan Bibi and others, brought a suit on the mortgage, dated the 13th of April, 1912, against Abdul Rahim, Abdul Aziz and others. A preliminary decree was passed on the 13th of July, 1926. The final decree followed on the 14th of January, 1927. The decree-holder applied to the Munsif of Gorakhpur for the execution of the decree and Abdul Aziz applied that the house purchased by him on the 14th of June, 1918, be sold last in execution of the final decree. On the 15th of July, 1927, the Munsif acceded to this prayer and passed an order to that effect behind the back of Abdul Rahim. Shortly after the making of the said order, Abdul Rahim appeared in court and presented an application protesting against the order of the learned Munsif directing that the house property purchased by Abdul Aziz be sold last. On the 27th of August, 1927, the Munsif reviewed the order dated the 15th of July, 1927, and directed that the said order could be availed of by Abdul Aziz on this condition that he paid a sum of Rs. 601 to

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the decree-holder in satisfaction of the mortgage, together with interest on the said amount at one rupee per cent. per mensem, compoundable every six months, from the 14th of June, 1918, the date of his purchase, right up to the date of his payment.

Aggrieved by the aforesaid order, Abdul Aziz lodged an appeal in the court of the learned District Judge which was heard by the Second Additional Subordinate Judge of Gorakhpur. A preliminary objection was raised by the respondent as regards the competency of the appeal. The learned Judge accepted the preliminary objection and dismissed the appeal upon the ground that no appeal lay to him. The ratio of the decision was that the order dated the 27th of August, 1927, was passed in the course of an execution proceeding in which Abdul Rahim and Abdul Aziz, the rival judgement-debtors, were ranged on opposite sides and there was no question "between the parties to the suit" in which the decree was made, within the meaning of section 47 of the Civil Procedure Code.

Abdul Aziz appeals to this Court and urges that the matter between the parties was one under section 47 of the Civil Procedure Code and that an appeal lay to the lower appellate court.

Section 47 of the Civil Procedure Code provides :—  
"All questions arising between the parties to the suit, in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit".

The conflict of interest in the execution department was between two sets of judgement-debtors and there was no question between the decree-holder on the one side and one or other of the judgement-debtors on the other side, relating to the execution, discharge or satisfaction of the decree. It would be straining the language of section 47 of the Code of Civil Procedure to hold that a dis-

pute of this description between two sets of contending judgement-debtors would fall within the purview of section 47. This question directly arose in *Raynor v. The Mussoorie Bank Ltd.*, (1). After discussing the facts of the case *BRODHURST and TYRRELL, JJ.*, observed at page 686 : "This application purported to be made under section 244 of the Civil Procedure Code. But apart from other considerations showing that section 244 is not applicable to a proceeding of this character, it is sufficient here to observe that an application cognizable under that section must be an application *between* the parties, that is to say, between the parties arrayed against each other as decree-holder of the one part and judgement-debtors or their representatives of the other. But this is not such a question. It is a controversy of two judgement-debtors *inter se*, and the provisions of section 244 do not apply to the determination of such questions." This statement of law was cited with approval in *Anandi Kunwari v. Ajudhia Nath* (2), and it was observed that the controversy was between a judgement-debtor and his representative and that it would be straining the language of section 244 to hold that such a dispute fell within the scope of that section. In *Bhagwati v. Banwari Lal* (3) the majority of the Judges constituting the Full Bench expressed themselves in support of the above view. BANERJI, J., is reported to have said (see page 98) that "as regards the first condition it is manifest that the parties must be arrayed as decree-holder or his representative on the one side and the judgement-debtor and his representative on the other. Any question arising between the decree-holder and his representative or between the judgement-debtor and his representative is clearly not a question within the purview of section 244. This has been held so repeatedly that I deem it unnecessary to cite authorities."

(1) (1885) I. L. R., 7 All., 681.

(2) (1908) I. L. R., 30 All., 379

(3) (1908) I. L. R., 31 All., 82. (383).

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The learned counsel for the appellant relies upon the case of *Vedaviasa Aiyar v. The Madura Hindu Labha Co. Ltd.*, (1). Their Lordships rule in that case that section 47 of the Civil Procedure Code ought to admit of a liberal interpretation and should not be confined to cases where the question in controversy was between the decree-holder and the judgement-debtor. It is submitted with all respect that the above view is not supported by the language of section 47 of the Civil Procedure Code and is opposed to the *cursus curiae* of this Court which I am bound to follow.

The order not being one under section 47 of the Code of Civil Procedure, no appeal lay to the lower appellate court. It is not contended that the order was appealable independent of section 47, and it is also not contended that order XLIII of the Code of Civil Procedure applies. The result is that the appeal fails and should be dismissed with costs.

NIAMAT-ULLAH, J. :—I entirely agree with my learned brother in the conclusion he has arrived at and would dismiss the appeal. I, however, rest my decision on a different aspect of the case. I am of opinion that the question arising between the parties to this appeal, namely, whether the court of first instance was justified in imposing certain conditions for the property, in which the appellant is interested, being sold last is not one relating to “the execution, discharge or satisfaction of the decree” and for that reason the order impugned in this appeal is not one which can be regarded as an order passed under section 47 of the Civil Procedure Code. I hesitate in accepting the view that section 47 of the Code of Civil Procedure can, under no circumstances, apply to an order passed by a court executing the decree as between two judgement-debtors *inter se*. The relevant

(1) [1924] A. I. R., (Mad.) 365.



part of section 47 is this:—"All questions arising between the parties to the suit, in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit." As I read the section, all that is necessary to be made out for its application is that the parties between whom a question relating to the execution, discharge or satisfaction of the decree arises should have been parties to the suit whether arrayed on the same side or on opposite sides. The word "between" does not, in my opinion, imply that such parties should have been arrayed as plaintiff and defendant. The words "between the same parties" occur in section 11 of the Civil Procedure Code and it has been repeatedly held in relation to questions of *res judicata* that parties arrayed on the same side may have a conflict of interest and a decision arrived at on questions between them in a suit in which they are arrayed on the same side operates as *res judicata* in a subsequent suit in which they are arrayed on opposite sides. Some of the reasons for the view taken by the learned Judges of the Madras High Court in the case referred to by my learned brother merit consideration. In a suit for partition, or for rendition of accounts, or in an administration suit, after a decree has been passed questions may arise between the parties arrayed on the same side in the course of execution proceedings and if the scope of section 47 of the Code of Civil Procedure is narrowed down only to cases in which questions relating to execution, discharge or satisfaction of the decree arise between the decree-holder and the judgement-debtor, the very object underlying that section may be frustrated. While I am not prepared to dissent from the authorities which my learned brother has quoted in support of his view, I venture to express my hesitation in accepting that view as absolutely correct

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 ABDUL RAHIM. and of general application. As I agree in dismissing the appeal on another ground I need not examine the view in all its aspects and content myself by merely reserving my opinion on the question.

*Before Sir Grimwood Mears, Knight, Chief Justice  
 and Mr. Justice Young.*

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 February, 19.

NATHU AND ANOTHER (APPLICANTS) v. BABU RAM  
 (OPPOSITE PARTY).\*

*Civil Procedure Code, order XLI, rule 19—Appeal dismissed for default—Pleader engaged in another court—"Sufficient cause" for restoration.*

When an appeal was called on, the appellants were present in court but their pleader was arguing a case in another court near by, and one of the appellants went to call him. The pleader came up after 10 or 12 minutes, but the appeal had in the meantime been struck off in default. An application for restoration was disallowed. On appeal the case was restored and it was *held* that in these circumstances it would have been the proper course for the court to have stood the case over for a few minutes to enable the pleader to attend. Whilst courts of law have a right to insist that parties and their pleaders shall be ready when the case is called on, allowance must at times be made for an inevitable happening such as this case and some indulgence shown in order that the parties may have their cases decided on the merits.

Messrs. *Hyder Mehdi* and *Zafar Mehdi*, for the appellants.

Mr. *K. C. Mital*, for the respondent.

MEARS, C. J. and YOUNG, J. :—On the 22nd of July, 1927, Nathu and Sarju were appellants in a case fixed to come on before the Subordinate Judge, Muzaffarnagar. Nathu and Sarju were both present and they had

\* First Appeal No. 204 of 1927, from an order of Raj Rajeshwar Sahai, Subordinate Judge of Muzaffarnagar, dated the 27th of August, 1927.

engaged a pleader, B. Mulchand. At the moment when the case was called on, B. Mulchand, in the ordinary course of his profession, was then arguing a case in the Munsif's court near by. According to the affidavit of the appellants, Sarju went across to the Munsif's court to call his pleader, and when the pleader returned after some 10 or 12 minutes the appeal had been struck off. An application to restore it was heard and disposed of adversely to Nathu and Sarju on the 27th of August, 1927, and the Judge's order is as follows:—"The appellants had gone to call their pleader when the appeal was called on for hearing on the 22nd of July, 1927. It was their duty to attend in time or to engage a pleader who could attend in time. This view is supported by 24 Indian Cases, 826." We think the Judge has taken much too narrow a view of this matter. The Judge must have been satisfied that Nathu and Sarju were in fact in court on the 22nd of July. He must also have been satisfied that they had duly engaged a pleader. He must have been aware that it is the practice of pleaders to earn their livings in other courts than his and that B. Mulchand was legitimately at that moment carrying on his profession in the adjacent court of the Munsif. When the case was called on the Judge should have asked whether Nathu and Sarju were present, and if they were, whether they had engaged counsel. Had he done this, we have no doubt that he would have learnt that B. Mulchand was their counsel but was at that moment engaged before the Munsif. Under these conditions it would have been the proper course to have stood the case over for a few minutes to enable B. Mulchand to attend. An application for restoration was in fact drafted on the afternoon of the very day, the 22nd of July, but there is nothing on the documents before us which indicates whether B. Mulchand made any oral application to the Judge. We are of opinion that he should have done so,

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and that immediately on returning from the Munsif's court he should have told the Judge what had happened and asked the Judge to restore the case to his list and proceed with it. Had that application been made we conceive that it would have been the duty of the Judge to have at once restored the case to the list and heard it on that day, if possible. Whilst courts of law have a right to insist that parties and their pleaders shall be ready when the case is called on, allowance must at times be made for an inevitable happening such as this and some indulgence shown in order that the parties may have their cases decided on the merits. We, therefore, set aside the order of Pandit Raj Rajeshwari Sahai and order that the appeal be restored to the court of the Subordinate Judge of Muzaffarnagar and be heard and disposed of according to law.

*Before Mr. Justice Sulaiman and Mr. Justice Kendall.*

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February, 19.

PARAS RAM SINGH (PLAINTIFF) v. RAJ KUMAR SINGH  
AND OTHERS (DEFENDANTS).\*

*Act (Local) No. II of 1901 (Agra Tenancy Act), section 10—  
Ex-proprietary rights, accrual of—"Transfer by sale in  
execution of a decree or order"—Foreclosure of mortgage  
by conditional sale is not such transfer.*

According to the language of section 10 of the Agra Tenancy Act of 1901 there must be either a sale in execution of a decree or order, or there must be a voluntary alienation, for the purpose of accrual of ex-proprietary rights. Foreclosure of a mortgage by conditional sale, though it is effected by a decree of court, is neither a sale in execution nor a voluntary alienation, and therefore no ex-proprietary rights can accrue upon the foreclosure.

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\* Second Appeal No. 1700 of 1926, from a decree of Muhammad Ali Ausat, District Judge of Ghazipur, dated the 25th of June, 1926, reversing a decree of Muhammad Junaid, Munsif of Saidpur, dated the 22nd of April, 1926.

Mr. K. K. Verma, for the appellant.

Mr. N. P. Asthana (for whom Mr. Kedar Nath),  
for the respondents.

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SULAIMAN and KENDALL, JJ. :—These four connected appeals arise out of four separate suits for pre-emption. On the 18th of March, 1925, Musammat Rajkali Kunwar sold a 2 pie share in 10 villages to three vendees, Raj Kumar, Paras Ram and Ram Raj Singh for Rs. 500 without any specification of shares. The suits were decreed by the first court on the ground that Ram Raj was a stranger, and the plaintiffs had therefore a right to pre-empt the property against all the vendees. The learned District Judge has allowed the appeals and dismissed the suits. His judgement is based on the findings that Raj Kumar is a recorded co-sharer, that Paras Ram, although not recorded, is the brother of Kagji who is a recorded co-sharer and with whom he forms a joint Hindu family, and that Ram Raj is an ex-proprietary tenant in this mahal though not in the villages in which the shares are situated.

It is not disputed before us that Raj Kumar is a recorded co-sharer. We must also accept the finding of the court below that Paras Ram, being joint with his brother Kagji, is also a proprietor though not recorded as such. The finding that Ram Raj is an ex-proprietary tenant is challenged before us.

No doubt Ram Raj is recorded in the revenue papers as an ex-proprietary tenant in three out of 10 villages, all of which lie in one mahal. But a mere entry of the name is by no means conclusive. Nor does the fact that Ram Raj has occupied this land professedly as an ex-proprietary tenant for so many years necessarily confer upon him the ex-proprietary tenancy, inasmuch as such tenancy is the creation of the statute and cannot be acquired otherwise.

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It appears that in 1906 a foreclosure decree was passed against Ram Raj and thereafter his proprietary interest passed out of his hands. The question whether Ram Raj became an ex-proprietary tenant on the passing of this foreclosure decree raises a point which we have to decide.

No doubt the opinion has prevailed in the Board of Revenue that ex-proprietary rights can be acquired on the foreclosure of a mortgage by conditional sale. This view was expressed as early as 1903 and has been followed in some cases since then, although it also appears that at least on one occasion in 1910 the two learned members differed on the point. Although the opinion of the honourable members of the Board is entitled to great weight, we are not bound to follow their view. Nor can we accept that view on any principle of *stare decisis*. The learned counsel for the parties have not been able to cite before us any case of this Court in which this point has been decided one way or the other. We accordingly propose to examine the language of section 10 of the Agra Tenancy Act, 1901, under which an ex-proprietary tenancy can be created. It provides that "every proprietor whose proprietary rights in a mahal or in any portion thereof, whether in any share therein or in any specific area thereof, are transferred, on or after the commencement of this Act, either by sale in execution of a decree or order of a civil or revenue court or by voluntary alienation, otherwise than by gift or by exchange between co-sharers in the mahal, shall become a tenant with a right of occupancy in his *sir* land etc." No doubt the word "transfer" is used, but it is qualified by the expression "by sale in execution of a decree or order . . . or by voluntary alienation." Unless, therefore, the foreclosure can amount to a sale in execution of a decree or order or to a voluntary alienation, the section is inapplicable. We may point out that according

to the language employed in the section it is impossible to hold that the word "by" is understood before the word "order". We cannot, therefore, hold that any transfer by order of a civil or revenue court would be sufficient. In our opinion the words "decree" and "order" are connected with each other by the conjunction "or" and are part of one expression, "sale in execution of a decree or order, etc". It follows therefore that there must either be a sale in execution of a decree or order, or there must be a voluntary alienation.

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Before the Transfer of Property Act was passed there was good ground for holding that the proceedings in court following upon a mortgage by conditional sale were a mere ministerial act and not a judicial act: *Alexander John Forbes v. Ameeroonissa Begum* (1). But after the passing of the Transfer of Property Act foreclosure proceedings were governed by the Transfer of Property Act and are now governed by the Code of Civil Procedure. Sale is defined in section 54 as a transfer for a price paid or promised, or part paid and part promised. Under section 87 of the Transfer of Property Act, which was in force in 1906 when the foreclosure decree was passed, on failure to deposit the mortgage money, the plaintiff mortgagee had to apply to the court for an order that the defendant and all persons claiming through and under him be debarred absolutely of all rights to redeem the mortgaged property, and the court had to pass such an order. On the passing of such an order the debt secured by the mortgage stood discharged. Thereafter the right to redeem the property was obviously extinguished. In view of these provisions it is impossible for us to hold that the foreclosure was in the nature of a sale in execution of a decree. Nor can we hold that the foreclosure amounted to a voluntary alienation by the mortgagor on the date when the foreclosure

(1) (1865) 10 Moo. I. A., 340.

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decree was passed. The proceedings in court were not a mere ministerial act but were the result of a preliminary decree passed by the court. We are accordingly compelled to hold, on the language of section 10 as it stood, that no ex-proprietary right accrued on the passing of such a foreclosure decree. It is admitted that no such rights accrued on the date when the mortgage by conditional sale was executed, which had happened before 1903.

We are glad to note that the Legislature has intervened to cure this defect, and section 14 of the new Agra Tenancy Act makes it clear that ex-proprietary rights do accrue even on the passing of a foreclosure decree.

In this view of the matter we must hold that Ram Raj Singh is not an ex-proprietary tenant. It is, therefore, unnecessary to consider whether his being an ex-proprietary tenant of only three out of ten villages would entitle him to resist the claim as regards the other villages also, on the ground that they all are in one mahal.

[The judgement then considered another point, not material for this report, and proceeded.] It must, therefore, be held that Ram Raj is neither an ex-proprietary tenant nor a co-sharer in the mahal, and is accordingly a stranger. The other vendees having associated themselves with Ram Raj have lost their right to resist the plaintiff's claim for pre-emption.

The appeals are accordingly allowed and the decrees of the lower appellate court set aside and those of the first court restored with costs in all courts.



*Before Mr. Justice Mukerji and Mr. Justice Niamat-ullah*

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February, 20.

ROHAN LAL (APPLICANT) *v.* THE COLLECTOR OF  
ETAH (OPPOSITE PARTY).\*

*Act No. I of 1894 (Land Acquisition Act), sections 21 and 23(1)—Land occupied by occupancy tenants—Assessment of value of such land—Apportionment of compensation between landlord and tenants—Valuation of occupancy rights—Scope of inquiry by District Judge—Extent of rights of objector where the other parties have not contested the award.*

In proceedings under section 21 of the Land Acquisition Act, 1894, commenced on the objection of the zamindar of the acquired land, the District Judge can re-apportion the shares, out of the total compensation money, payable respectively to the zamindar and the occupancy tenants, although the tenants did not contest the Collector's award; and the zamindar is entitled to the share so apportioned to him and has no right to demand the whole of the compensation money minus the amount awarded to the tenants by the Collector.

Under section 23(1) of the Land Acquisition Act, in determining the amount of compensation the court should take into consideration the market value of the land, and this would mean that the value of the land should be ascertained irrespective of the question as to how it is held, *i.e.* whether by the landlord himself or by permanent or temporary tenants.

Considerations and criteria for the apportionment of the compensation money between the zamindar and the occupancy tenants were laid down by the High Court, and where the District Judge had apportioned the money in the shares of 2 annas and 14 annas, respectively, the High Court altered the shares to 10 annas and 6 annas, respectively.

*L. W. Orde v. Secretary of State for India in Council* (1), not approved. *Raja of Pittapuram v. The Revenue Divisional Officer, Cocanada* (2), referred to.

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\* First Appeal No. 141 of 1926, from a decree of J. Allsop, Additional Judge of Aligarh, dated the 23rd of December, 1925.

(1) (1918) I. L. R., 40 All., 367.

(2) (1919) I. L. R., 42 Mad., 644.

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Dr. K. N. Katju, Mr. Panna Lal and Mr. Misri  
*Lal Chaturvedi*, for the appellant.

Mr. U. S. Bajpai and Mr. Iqbal Ahmad, for the  
respondent.

MUKERJI and NIAMAT-ULLAH. JJ.:—This appeal arises out of proceedings taken for acquisition of land in the district of Etah. The area acquired is small and the learned District Judge has found that the total market value of the land is Rs. 1,600. The zamindar of the land, which was in the possession of occupancy tenants when it was acquired, was the only contesting party before the District Judge. The tenants were given a small amount of money as compensation and they did not choose to contest the Collector's award.

The learned District Judge, having found that Rs. 1,600 was the market value of the acquired plot, proceeded to find out what would be the fair share for the zamindar's interest. He found that the tenants paid a rent of Rs. 8-13 per annum to the landlord and the landlord paid Rs. 3 as the land revenue. The learned Judge accordingly found that Rs. 5-13 a year or roughly Rs. 6 was the zamindar's income from the property. The patwari stated before the learned Judge that a sub-tenant of the occupancy tenants was likely to pay a rent of between Rs. 20 and Rs. 25. The learned Judge then expressed the opinion that having regard to the situation of the plot and the possibility of growing tobacco on it, the tenant was likely to make Rs. 40 a year out of the land. Thus the learned Judge thought that the tenant could make seven times the profit which the zamindar could make out of the land. Proceeding on this basis, the Judge thought that the zamindar's income from the property was one-eighth of the total income and that, therefore, he should assess the value of the zamindar's interest at one-eighth of the total value.

He accordingly directed that a sum of Rs. 200 be paid to the appellant before us, the zamindar.

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Although one of the grounds of appeal before us states that the market value of the land is not less than Rs. 2,400, the learned counsel has accepted Rs. 1,600 as the right market value for the purposes of his appeal. His contention is that the learned Judge has awarded to his client a grossly inadequate amount as compensation. We have to see if this contention is substantially right.

As regards the contention of the learned counsel that the occupancy tenants not having chosen to contest the award, the zamindar should get the entire market value of the land minus the amount paid to the occupancy tenants, it is sufficient to say that this contention is not sound. The fact that the occupancy tenants have accepted the compensation awarded to them amounts to this that there is no contest as between the Collector and the occupancy tenants. If by the award the Government happens to be the gainer, that gain is entirely the Government's and the zamindar has no right to share in that gain. If the compensation awarded to the tenants had been too large, the zamindar would not have been precluded from saying that whatever the Collector might choose to give to the tenants, he, the zamindar, was entitled to a fair compensation for himself. On principle, therefore, the appellant cannot get anything more than what fairly should be awarded to him. This view would find support from the language of section 21 of the Land Acquisition Act which runs as follows: "The scope of the inquiry in every such proceeding (before the District Judge) shall be restricted to a consideration of the interests of the persons affected by the objection."

Coming now to the compensation to be given to the appellant, the learned District Judge has relied on the case of *L. W. Orde v. Secretary of State for India in*

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*Council* (1). In that case two learned Judges of this Court held that where land is occupied by an occupancy tenant, the owner is not entitled to anything more than the capitalized value of the rent-income from the plot. We have great difficulty in accepting the view of the learned Judges of this Court. The right principle to be adopted in awarding compensation and in apportioning the same seems to be this :—

Under section 23, sub-section (1), of the Land Acquisition Act, in determining the amount of compensation the court should take into consideration the market value of the land at the date of the publication of the notification. This would mean that the value of the land should be found out, irrespective of the question how it is held. The land may be held by a permanent lessee, with the result that neither the landlord nor the lessee alone represents the whole estate. In such circumstances the landlord or the lessee alone may not possess the absolute right to dispose of the entire body of interests in the land. But that is no reason why the compensation to be awarded for the same land should be different in different circumstances. If a land is worth, say, Rs. 2,000 in open market, its value would remain Rs. 2,000 whether the landlord holds it in his own possession without encumbrances or whether he has let it out permanently to some people. What therefore has to be done is first to find out what is the market value of the land itself, irrespective of any consideration as to how it is held. The next step would be to apportion the value among the several parties holding distinct and separate interests in the land. If, for example, there be 4 co-owners and no tenant, the value would be divided equally among the 4 co-owners. If there be, say a landlord and a tenant, the value will have to be apportioned between the two according to their respective in-

(1) (1918) I. L. R., 40 All., 367.

terests. This opinion of ours finds support in the case of *Raja of Pittapuram v. The Revenue Divisional Officer, Cocanada* (1).

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The next question is, how is the compensation to be divided between the landlord and the occupancy tenant? In our opinion the learned Judge, in arriving at the figure Rs. 40 as the profit of the tenant, has omitted to consider the fact that the tenant's income includes the

Please substitute pages 769-770 for pages bearing similar folios issued with the September issue of I. L. R., Allahabad Series, for 1929.

very much limited; (4) that in the case of rent falling into arrears, from whatever reason, he is liable to be ejected; (5) that in the case of the tenant dying without one of the statutory heirs, the tenancy would lapse to the landlord. We might add that the number of statutory heirs is small and the chances of the occupancy rights lapsing are not at all remote.

Having regard to all the circumstances, although a tenant may, for the time being, make out of the land more than the landlord can make out of it, the actual gain of the tenant is less than that of the landlord. The landlord may easily borrow money on the security of the property and at any time may sell the property outright. The minerals under the land belong to the landlord and

(1) (1919) I. L. R., 42 Mad., 644.

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The next question is, how is the compensation to be divided between the landlord and the occupancy tenant? In our opinion the learned Judge, in arriving at the figure Rs. 40 as the profit of the tenant, has omitted to consider the fact that the tenant's income includes the value of his own labour and the value of some capital in the way of purchasing seed, employing labour and paying for irrigation costs. A tenant who tills his own soil gets the crop not only as the value of his right to hold the land but also as the value of his labour and capital spent. Usually the labour is not only his own labour but also the labour of his whole family and also possibly hired labour. Further, in assessing the proportionate value of occupancy rights, several matters have to be borne in mind. They are these facts, viz.:—(1) that an occupancy tenant's rent is liable to enhancement, although within statutory limits; (2) that the tenant is unable to transfer his rights; (3) that his right even to sublet is very much limited; (4) that in the case of rent falling into arrears, from whatever reason, he is liable to be ejected; (5) that in the case of the tenant dying without one of the statutory heirs, the tenancy would lapse to the landlord. We might add that the number of statutory heirs is small and the chances of the occupancy rights lapsing are not at all remote.

Having regard to all the circumstances, although a tenant may, for the time being, make out of the land more than the landlord can make out of it, the actual gain of the tenant is less than that of the landlord. The landlord may easily borrow money on the security of the property and at any time may sell the property outright. The minerals under the land belong to the landlord and

(1) (1919) I. L. R., 42 Mad., 644.

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not to the occupancy tenant, whose rights are confined to the tilling of the upper soil. If any mineral is discovered under the soil, it would be the landlord who would be entitled to it and not the occupancy tenant. In our opinion, therefore, there is a substantial disparity between the rights of the landlord and the rights of an occupancy tenant, in these provinces.

But when all is said, it remains still difficult to give a money value to the respective rights of the zamindar and the occupancy tenant. But howsoever we may decide, we have to assign somewhat arbitrary value to the two rights. Having given the case our best consideration, we think that it is a fair estimate of the respective rights to say that, in a rupee the landlord's share ought to be ten annas and the occupancy tenant's right six annas.

We hold that the appellant is entitled to Rs. 1,000 as the proper share of the compensation money found by the learned Judge. We allow the appeal, modify the decree of the court below and direct that a sum of Rs. 1,000 be given to the appellant as the compensation payable to him. The appellant will have one-half of his costs in this Court and the court below, and the respondent will pay his own costs throughout.

## PRIVY COUNCIL.

JAMES SKINNER (DEFENDANT) *v.* R. H. SKINNER  
(PLAINTIFF) AND OTHERS.

[On appeal from the High Court at Allahabad.]

J. C.\*

Act No. XVI of 1908 (*Indian Registration Act*), sections 17  
and 49—*Specific performance—Unregistered sale-deed—*  
*Admissibility in evidence.*

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A document which upon its true construction is a sale-deed, purporting to transfer an interest in immovable property of the value of Rs. 100 and upwards, is precluded by section 49 of the Indian Registration Act, 1908, from being admitted in evidence in a suit for specific performance of the agreement to transfer said to be contained therein unless it is registered in accordance with the Act.

*Sanjib Chandra Sanyal v. Santosh Kumar Lahiri* (1),  
*Satyanarayana v. Chinna Venkata Rao* (2) and *Ramling Par-*  
*watayya v. Bhagwant Sambhuappa* (3), approved.

Decree of the High Court reversed as to construction of the document.

APPEAL (No. 97 of 1928) from a decree of the High Court (January 22, 1926) reversing a decree of the Additional Subordinate Judge of Meerut (May 19, 1923).

The suit was brought by the first respondent against the administrator of Richard Skinner (represented in the appeal by the second respondent) for specific performance. The plaintiff alleged an agreement dated June 18, 1921, by George C. E. Skinner for the sale to him of properties which George had inherited from his brother Richard. The appellant was

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\*Present: Lord CARSON, Lord DARLING, Sir LANCELOT SANDERSON,  
Sir GEORGE LOWNDES and Sir BINOD MITTER.

(1) (1921) I.L.R., 49 Cal., 507

(2) (1925) I.L.R., 49 Mad., 302.

(3) (1925) I.L.R., 50 Bom., 334.



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the executor of Alice Skinner, a sister of Richard and George; she was made a defendant as claiming a half-share in Richard's estate.

The terms of the document of June 18, 1921, appear fully from the judgement of the Judicial Committee.

Issue No. 9 raised the question whether the document was admissible in evidence.

The trial judge held that the document was a sale-deed and that as it was not registered under the Indian Registration Act, 1908, it was inadmissible in evidence; accordingly he dismissed the suit.

Upon appeal the decree was reversed and an order made for specific performance of the agreement by the conveyance of George's interest at the conclusion of the administration. The learned Judges (LINDSAY and KANHAIYA LAL, JJ.) were of opinion that the document, having regard to the whole of its terms, and the circumstances in which it was executed, ought to be treated as an agreement for sale, and that they had a discretion to decree specific performance although it was not registered.

1929. June 10, 11, 13. *DeGruyther, K. C. and Kenworthy Brown* for the appellant: The document of June 18, 1921, upon its true construction, was a sale-deed transferring the vendor's interest in his brother's property; it was therefore within section 17, sub-section 1 (b) of the Registration Act. It did not merely create a right to another document so as to be within section 17, sub-section 2 (v). Consequently it was inadmissible in evidence, having regard to section 49.

*Dunne, K. C. and E. B. Raikes* for the first respondent: The document was merely an agreement to sell such share as the vendor got upon the administration being concluded; a conveyance was contemplated when that took place. It was not clear until that took place whether immovable property would be transferred. But even if the document operated as a transfer of immovable property it was admissible in evidence in the suit merely as an agreement and for the purpose

of obtaining specific performance: *Bengal Banking Corporation v. Mackertich* (1), following the view of WEST, J., in *Burjorji Cursetji Panthaki v. Muncherji Kuverji* (2); *Mangamma v. Ramamma* (3), following earlier Madras decisions. Certain later decisions in India have taken a different view, but, it is submitted, that the construction of the Act adopted by WEST, J., is correct, and the only construction giving consistency to all the provisions of section 17. In *Dayal Singh v. Indar Singh* (4), though a similar question was discussed the Board expressly refrained from deciding that that view was wrong.

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*Kenworthy Brown* in reply: The actual decision in the *Bengal Banking Corporation* case (1) does not support the appellant; the remarks of GARTH, C.J., relied on were *obiter*. *Burjorji Cursetji's* case (2) is inconsistent with *Purmananddas Jiwandas v. Dharsey Virji* (5), and with a series of more recent cases in most of the High Courts. [Reference was made to the cases mentioned in their Lordships' judgement and others.] The question is also concluded by the judgements of the Board in *Hemanta Kumari Debi v. Midnapur Zamin-dari Co.* (6) and *Dayal Singh v. Indar Singh* (4). The document being within section 17, was by section 49 (c) not "to be received as evidence of any transaction affecting" the property.

July, 16. The judgement of their Lordships was delivered by Sir GEORGE LOWNDES:—

One Richard Skinner died in 1913 intestate, and his estate, which included immovable properties of considerable value, devolved upon his brother George Skinner and his sister Alice Skinner in equal shares. Richard Skinner was at the time of his death indebted to the Delhi and London Bank, and administration of his estate was granted to a Mr. Angelo, the Bank's manager. On the 18th June, 1918, while the estate was still under administration, George Skinner executed in favour of

(1) (1884) I.L.R., 10 Cal., 315.

(2) (1880) I.L.R., 5 Bom., 143.

(3) (1912) I.L.R., 37 Mad., 480.

(4) (1926) L.R., 53 I.A., 214.

(5) (1885) I.L.R., 10 Bom., 101.

(6) (1919) I.L.R., 47 Cal., 485.

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Robert Hercules Skinner, the first respondent in this appeal, a document in the following terms:—

*[The first sentence is torn out.]*

“This day between Mr. (torn out) at present at Meerut of the one part, hereinafter called the first party, and Mr. R. H. Skinner of Hansi of the second part, hereinafter called the second party.

“Whereas Mr. G. C. E. Skinner, the said first party (paper torn), heir to the estate of his late brother, Mr. R. R. Skinner, and the said first party therefore as heir has a (paper torn) in the property allotted to the late Mr. R. R. Skinner by the decree of the District Judge, Delhi, of August, 1888, partitioning the joint Skinner estate; and in all the property he subsequently acquired. And that whereas my brother R. R. Skinner died in about August, 1913, and that since his death there has been constant trouble and long, expensive and ruinous litigations and family disagreement, etc., owing to which vendor has not been able to get possession up to date, nor gets any benefit from it whatsoever.

“That whereas now Mr. R. H. Skinner of the second part, hereafter called the vendee, has agreed to purchase all these properties left me by my said late brother, Mr. R. R. Skinner.

“Therefore I, G. C. E. Skinner of the first part, hereafter called the vendor, with my free will, wishes and consent do hereby sell all my share, I have inherited from my late brother, Mr. R. R. Skinner, to Mr. R. H. Skinner for Rs. fifty thousand, to keep the property in the family and for all what the vendee has done for me, it is therefore mutually agreed as follows:—

“1. That the vendee, Mr. R. H. Skinner, do pay to the said vendor, Mr. G. C. Skinner, Rs. one thousand as earnest money by cheque.

“2. That as all this property is in the hand of Mr. Angelo, the administrator of the estate of my late brother, Mr. R. R. Skinner, the vendor will do his best to get the vendee full possession.

"3. Should for any reason the vendor fail or do not satisfy the vendee, in this case the vendee has my free consent to take any action he considers proper and necessary to get full possession, and mutation of names done in the said vendee's favour.

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"4. From the date of agreement all expenses for litigation now pending which, if the vendor chooses to hand over to the vendee or that may hereafter be filed by the vendee in the above matter, will be borne by the vendee.

"5. That the cases now pending and all matters with reference to these properties, the said vendor shall give a correct and complete list of all cases, also a list of all papers and books, etc., in the possession of the said vendor to the said vendee and take a receipt for any reason, the vendor fail, the vendor will be responsible for loss, etc., and not the vendee.

"6. In addition to the price stated above the said vendee will have to pay the Delhi and London Bank, Delhi, vendor's share of the debt left by the late Mr. R. R. Skinner, but the said vendor will pay all debts the said vendor may have contracted on this said property after the death of the late Mr. R. R. Skinner and release it for the vendee.

"7. That the vendor declares that he is the sole heir to this said property, but should other heirs be established . . . by order of any court the vendor is not responsible.

"8. The said vendor confirms this to be a complete and conclusive sale binding on the said vendor and on all his heirs or assigns, etc., in favour of the said vendee . . . and if the vendee should ever consider necessary to execute a registered sale-deed . . . vendor or his heirs, assigns, etc., will always be ready to execute and register the same at the expenses of the vendee.

"9. In virtue of this sale and agreement if the vendee considers necessary the vendor will always be ready to execute and register a power-of-attorney or give the vendee any other document or help the vendee may demand.

"10. The balance of rupees forty-nine thousand will be paid by the vendee to the vendor the very year the vendee gets full legal possession of all the properties and the mutation of names all effected in the name of the vendee.

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"11. Should the vendee not be able to get mutation of names done in his name and get full and complete possession during the lifetime of the vendor the vendor in such case directs the vendee or his heir, Mr. J. A. R. Skinner, to pay the balance due to the heirs of the vendor.

"12. The schedule of the properties sold is hereunto annexed as noted below:—

"(a) All the properties noted in the decree of the District Judge, Delhi, August, 1888, partitioning the joint Skinner estates. (Ingram v. Orde and other.)

"(b) All the properties acquired by the late Mr. R. R. Skinner up to the time of his death. Therefore we, the undersigned, further confirm and ratify this sale and agreement by our signatures.....

"Meerut, 18th June, 1918.

(Sd.) GEORGE C. E. SKINNER, Vendor.

(Sd.) R. H. SKINNER, Vendee."

The document was not registered.

George Skinner died intestate in December, 1919, and on the 11th February, 1921, the first respondent instituted the suit out of which this appeal arises. The only defendant to the suit as originally framed was Angelo, administrator of Richard Skinner's estate, and the primary prayer of the plaint was for specific performance of the agreement of sale, dated 18th June, 1918"—the reference being to the document above set out—and for possession of the property. It is obvious that Angelo did not represent George Skinner's estate, and it is admitted that in this respect the suit was defective, but various parties were subsequently added, including Alice Skinner, whose right to a half-share in Richard Skinner's estate was disputed in the court of first instance, and Thomas Skinner, the third respondent, who was appointed administrator *ad litem* of George Skinner. Major Skinner was also substituted

for Angelo as administrator of Richard Skinner, and on the death of Alice Skinner, pending the proceedings in India, James Skinner, the present appellant, was brought on the record as her executor.

Various matters were debated in the course of the proceedings in India, with which their Lordships have not been asked to deal, but the principal issue in the case, and that upon which the determination of this appeal depends, was whether the document of the 18th June, 1918, was admissible in evidence. This in the argument before the Board has resolved itself into two questions, viz. (1) whether the document comes within the provisions of section 17 of the Indian Registration Act, XVI of 1908, and so required registration; and (2) whether, if registration was necessary, it could form the basis of a suit for specific performance notwithstanding the provisions of section 49.

On the first question the Subordinate Judge by whom the suit was tried was of opinion that the document was a sale deed requiring registration under section 17, and that, being unregistered, it was not admissible in evidence, and he accordingly dismissed the suit. The High Court, on appeal, differed from this conclusion. The learned Judges held that the document ought to be "treated as being an agreement for sale rather than as a sale deed," and that, therefore, registration was not necessary, and they made a decree for specific performance in respect of George Skinner's moiety of the property upon certain terms. Against this decree the executor of Alice Skinner has appealed to His Majesty in Council.

In the course of the arguments the document of the 18th June, 1918, has been discussed with great minuteness, but their Lordships have no doubt that the view taken of it by the Subordinate Judge was right. The language employed is perhaps not that of a trained draftsman, but it clearly purports to transfer George Skinner's

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interest in the immovable properties which he had inherited from Richard Skinner, particulars of which are set out in the schedule, and it accordingly comes within the terms of section 17 of the Act and required registration.

The second question is perhaps a more difficult one, though the difficulty arises rather from the divergent views to be found in the Indian case law on the subject than from the interpretation of section 49 of the Registration Act. It is unfortunate that this aspect of the case was not submitted to the Indian courts, and their Lordships have therefore not had the assistance of the High Court in discussing the numerous decisions which have been referred to before them.

Their Lordships, however, think that the meaning of section 49 is clear. The section runs as follows :—

“49. No document required by section 17 to be registered shall—

- (a) affect any immovable property comprised therein;  
or
  - (b) confer any power to adopt; or
  - (c) be received as evidence of any transaction affecting such property or conferring such power,
- unless it has been registered.”

If an instrument which comes within section 17 as purporting to create by transfer an interest in immovable property is not registered, it cannot be used in any legal proceedings to bring about indirectly the effect which it would have had if registered. It is not to “affect” the property, and it is not to be received as evidence of any transaction “affecting” the property.

In the present case the document under consideration, in addition to creating an interest in the immovable property concerned, provides as one of the terms, and



therefore as an integral part of the transfer, that the vendor should, if the vendee so requires, execute a registered sale-deed, and it is contended for the first respondent that, notwithstanding the non-registration, he can sue upon this agreement, putting the document in evidence as proof of it. Their Lordships are clearly of opinion that this is within the prohibition of the section. They think that an agreement for the sale of immovable property is a transaction "affecting" the property within the meaning of the section, inasmuch as, if carried out, it will bring about a change of ownership. The intention of the Act is shown by the provision of section 17 (2) (v), which exempts from registration, and therefore frees from the restriction of section 49, a document which does not itself create an interest in immovable property, but merely creates a right to obtain another document which will do so. In the face of this provision, to allow a document which does itself create such an interest to be used as the foundation of a suit for specific performance appears to their Lordships to be little more than an evasion of the Act.

A number of cases from the Indian Reports have been referred to on either side in the argument before this Board, and it is clear that many of the decisions are irreconcilable. Their Lordships think, therefore, that no good purpose would be served by a detailed examination of them, but they have the satisfaction of knowing that the principle which has been enunciated above is in accordance with recent decisions in most of the High Courts. See *Sanjib Chandra Sanyal v. Santosh Kumar Lahiri* (1), *Satyanarayana v. Chinna Venkata Rao* (2), *Ramling Parvatayya v. Bhagwant Sambhuappa* (3).

For the reasons given their Lordships are of opinion that the High Court was wrong in granting a decree for

(1) (1921) I.L.R., 49 Cal., 507.

(2) (1925) I.L.R., 49 Mad., 302.

(3) (1925) I.L.R., 50 Bom., 334.

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specific performance, and that the first respondent's suit should have been dismissed. They will therefore humbly advise His Majesty that this appeal should be allowed, that the decree of the High Court should be set aside, and that of the Trial Judge restored. The first respondent must pay the appellant's costs both here and in the High Court.

Solicitors for appellant: *Chapman Walker and Shephard.*

Solicitors for first respondent: *T. L. Wilson & Co.*

### APPELLATE CIVIL.

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February, 19.

*Before Mr. Justice Boys and Mr. Justice Ashworth.*

KALIKA PRASAD (PLAINTIFF) v. AJUDHIA PRASAD  
(DEFENDANT.)\*

*Act (Local) No. II of 1903 (Bundelkhand Alienation of Land Act), sections 9, 10, 16(1) and 22—Mortgage by conditional sale after Act—Parties not then belonging to "agricultural tribes"—Subsequent notification declaring them members of "agricultural tribes"—Remedies of such mortgagee—Civil Procedure Code, sections 105(2) and 151—Question of law wrongly decided in order of remand—Not appealed—Inherent power to remedy injustice.*

After the Bundelkhand Alienation of Land Act, 1903, came into force a mortgage by conditional sale was executed between parties who at that time were not included in the "agricultural tribes" declared under section 4 of the Act. Later, by notification under section 4, the list of "agricultural tribes" was extended, as a result of which the parties were classed as members of the same agricultural tribe. Subsequently the mortgagee sued upon his mortgage and the Munsif held that by virtue of section 10 of the Act the condition as to foreclosure was void and that consequently the mortgage

\*Second Appeal No. 399 of 1926, from a decree of E. L. Norton, District Judge of Jhansi, dated the 4th of December, 1925, reversing a decree of Shri Nath. Munsif of Orai, dated the 12th of September, 1925.

itself fell through, and he dismissed the suit. On appeal the District Judge agreed that section 10 applied, but holding that the effect thereof was no more than to convert the mortgage into a simple mortgage, remanded the case to the Munsif. The Munsif then found what sum was due on the mortgage and referred the case to the Collector under section 9(3). The Collector held that section 9 was not applicable at all, as the mortgagor was not a member of an agricultural tribe at the date of the mortgage and this view was, finally, upheld by the Board of Revenue. The Munsif then again took up the case and passed a decree for sale. On appeal the District Judge held that section 16 of the Act applied and he set aside the decree for sale and dismissed the suit. On appeal to the High Court, *held*—

*Per Boys, J. :—*

(1) The mortgage in question, regarded as only a simple mortgage as held by the unappealed order of remand, must, according to the decision of the majority in the Full Bench case of *Ram Sahai Singh v. Debi Din* (1), be held not to come under section 9 of the Bundelkhand Alienation of Land Act; and, upon a consideration of the scheme and intention of the Act, section 16 was not applicable to a mortgage which did not come within sections 6 and 9, i.e., within the scope of the Act and the mischief contemplated by it; therefore, the mortgagee would be entitled, upon the simple mortgage, to a decree for sale.

(2) Also, exactly the same reasoning which applied to exclude section 16 from operation to a mortgage not within the scope of the mischief aimed at by the Act applied to exclude the operation of section 10; the mortgage, as a mortgage by conditional sale, was therefore not invalid; and although no party appealed from the remand order holding the foreclosure clause to be illegal, the High Court had power, in the circumstances of the case, under section 151 of the Civil Procedure Code to reverse that view and hold the mortgage to be a valid mortgage by conditional sale and grant a decree for foreclosure.

(3) It was impossible to conceive that section 16 was intended to apply to cases where the legislature was not giving the mortgagee any other remedy, which it considered to be an equitable equivalent, by the Act.

(1) (1926) I.L.R., 49 All., 8.

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Per ASHWORTH, J. :—

(1) A notification under section 4, declaring certain classes of persons to be agricultural tribes, must be deemed to have retrospective effect and, therefore, the mortgage in question must be regarded as made by a member of an agricultural tribe.

(2) If the Collector decided that he had no jurisdiction to act under section 9(1) and revise a mortgage, his decision could not, under section 22, be questioned by a civil court. Also, according to the majority decision in the case of *Ram Sahai Singh* (1), section 9 did not refer to a mortgage executed by one agriculturist in favour of another and, therefore, it did not refer to the mortgage in question.

(3) As the legislature could not have intended to deprive a mortgage between two agriculturists of all effect, the logical consequence was that not only section 9 but no section of the Act applied to such a mortgage; hence section 10 did not apply and the mortgagee was entitled to a decree for foreclosure. A decree for sale was clearly barred by section 67(a) of the Transfer of Property Act.

(4) It would lead to an impossible situation if by section 105(2) of the Civil Procedure Code a High Court were, in an appeal from a decree, to be debarred from taking on a law point a different view from that taken by the District Judge in an interlocutory order. Section 151 was wide enough to prevent such an *impasse*.

Mr. P. L. Banerji, for the appellant.

Dr. N. C. Vaish, for the respondent.

Boys, J. :—This is a plaintiff's appeal arising out of a suit on a mortgage, the plaintiff mortgagee asking for his money or for foreclosure. The mortgage has, however, under circumstances which will have to be set forth, been held to be a simple mortgage, and this fact will have an important bearing on the applicability of the Full Bench decision to which reference will have to be made later. The history of the proceedings, which is important for the purposes of the present appeal, is as follows :—

(1) (1926) I.L.R., 49 All., 8.

In 1903—(Local) Act II of 1903, the Bundelkhand Land Alienation Act, was passed. By section 1(3) it was declared that the Act should come into force on a date to be declared by notification.

July 1, 1903—By notification the Act came into force on this date.

July 27, 1912—Date of the mortgage in suit. On this date Ajudhia Prasad, defendant respondent, executed a mortgage in favour of Kalika Prasad, the plaintiff appellant, for Rs. 160. It provided for interest at Re. 1-4-0 per mensem payable yearly, and the principal sum was to be repaid with any accumulated interest on the 15th of June, 1916, with a condition as to foreclosure if the money was not paid by that date.

October 11, 1913—By section 4 of the Act it was provided that by notification the Government might determine what bodies of persons are to be deemed agricultural tribes for the purposes of the Act; and on this date both the mortgagor and the mortgagee were declared to be agriculturists within the meaning of the Act. Prior to that date they had not been "agriculturists."

January 16, 1923.—On this date the mortgagee filed a suit asking for the money then due, Rs. 699-7-0, or for foreclosure. The defendant relied upon section 10 of the Bundelkhand Land Alienation Act. Section 10 provides that "in any mortgage of land made after the commencement of this Act, any condition which is intended to operate by way of conditional sale shall be null and void."

February 12, 1923.—The trial court held that the condition as to foreclosure must be struck out, and that if that was struck out there remained no legal relation of mortgagor and mortgagee between the parties, and dismissed the suit, since, if the bond was treated as a simple money bond, the remedy was barred by limitation.

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July 28, 1923.—The mortgagee having appealed, the District Judge held that the effect of striking out the condition was not to destroy wholly the relationship of mortgagor and mortgagee, but that there remained a mortgage. He held further that the Munsif had misunderstood the effect of section 9 (the Munsif had thought it only applicable before any suit was instituted), and finally remanded the case to the learned Munsif "for rehearing and deciding the questions not yet decided. If he finds that anything is due he will determine what is due . . . and then send the case to the Collector."

September 12, 1923.—The trial court found Rs. 160, principal, and Rs. 539-7-0 interest due and "referred the matter to the Collector under section 9(3) of the Bundelkhand Land Alienation Act for the exercise of the powers under section 9(1) of the said Act."

November 14, 1923.—The Collector held section 9 not applicable and refused to act under it on the ground that the mortgagor was not an agriculturist, and further held that even if both parties be regarded as agriculturists he need not, in view of an order of the Board, take any action.

The Commissioner held that the question whether the parties were agriculturists was *res judicata* by the civil court and cancelled the Collector's refusal to take action.

April 16, 1925.—On appeal the Board reversed the decision of the Commissioner and upheld that of the Collector that section 9 (1) was not applicable—the mortgagor not having been an agriculturist at the time when he made the mortgage—and that there was no provision in the Act for the case where, though the mortgage was made after the commencement of the Act, the Act had not been applied to the mortgagor at the date of the mortgage, i.e., the mortgage was made between the

commencement of the Act and the date of the notification applying the Act to the mortgagor. The Board further directed that a copy of its order should be sent to the trial court, the Munsif.

On September 12th, 1925, the learned Munsif proceeded to pass a preliminary decree for sale of the property under order XXXIV, rule 4, the decree to be framed on the basis of the order of the Munsif's proceeding dated the 12th of September, 1923, in which it had been found that Rs. 699-7-0 was due on the mortgage.

On December 4th, 1925, the lower appellate court held that "the matter is decided by section 16 of the Bundelkhand Land Alienation Act, under which no land belonging to a member of an agricultural tribe can be sold in execution of any decree or order of a civil court." The appeal was thereupon allowed and the suit dismissed with all costs against the plaintiff.

The plaintiff appeals to this Court and raises two pleas. It is contended that even upon the view taken by the lower appellate court the mortgagee was entitled at least to a decree for sale even though he might not be able to execute that decree. He meets the principle that the court will not give what must inevitably be an infructuous decree by the suggestion that if he is given a decree it is possible that the judgement-debtor may be induced to pay up, even though the decree cannot be executed by sale. This is not, I think, a contention which we should allow; but the real contest between the parties has been concerned with the two related questions :—

- (a) Whether a mortgage executed in the circumstances of the present case comes within section 9 of the Act, and
- (b) if it does not come within section 9, then is the mortgagee entitled to stand outside the Act altogether or does section 16 stand in his way?

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While these two questions are intimately related they must be dealt with separately.

I have set out at the commencement of this judgment, with what might seem at first sight unnecessary detail, the chequered history of this case, but I have deemed it advisable to do so because this case does not stand alone, and is only illustrative of the trouble and expense that is caused to individuals and to the public by the present state of the statutory law and of judicial decisions, whether of the civil or revenue courts, and of the orders of the Board of Revenue, taken together.

I will consider first the question whether the present mortgage can be held to fall within the purview of section 9. If it was open to me to hold that it does come within the purview of section 9 I might feel compelled to so hold, notwithstanding the fact that the Board of Revenue has refused to allow action to be taken under section 9.

There are two considerations which must be weighed in the circumstances of this case in determining the applicability of section 9. The first of these, as we proceed through the section, is whether the present mortgage can be said to come within the phrase in section 9 "a member of an agricultural tribe makes a mortgage of his land." For the mortgagor it may be contended with some force that in this case no member of an agricultural tribe made the mortgage, that he, the mortgagor, was not a member of an agricultural tribe at the time he made the mortgage, and this view was taken by the Collector and the Board of Revenue. On the other hand it may be contended on behalf of the mortgagee that we should give effect to the intention of the Act and that we should consider the words "a member of an agricultural tribe makes a mortgage" as including the case where a non-member of an agricultural



tribe makes a mortgage, and subsequently, before the mortgage comes into court, is declared to be a member of an agricultural tribe within the Act. It is not, however, necessary, in view of the next consideration, to answer this question, as it appears to me that the second consideration is conclusive.

I proceed to state that second consideration. In *Ram Sahai Singh v. Debi Din* (1), a Full Bench of this Court had to consider the applicability of section 9 to a simple mortgage executed after the Act between members of the same tribe. Two learned Judges, Mr. Justice WALSH and Mr. Justice DANIELS, placed an interpretation on the next following words,—“in any manner or form not permitted by or under this Act”—in accordance with which they held that a simple mortgage executed between members of the same tribe did not come within section 9 (1) of the Act. I myself was the third Judge in that Full Bench and I dissented from the view expressed by my brothers and would have held that such a mortgage was not excluded from section 9 by the phrase “in any manner or form not permitted by or under this Act”, but there can of course be no question but that I am bound to accept absolutely the decision of the majority. The mortgage with which we were there concerned was clearly not excluded from section 9 (1) by the words “a member of an agriculturist tribe makes a mortgage”, upon either the narrow or the wide interpretation. But as to the present case, even if the wider interpretation be put on those words and the mortgage passes that test, there remains the fact that the mortgage has been held to be a simple mortgage and being, *ex hypothesi*, made between members of an agricultural tribe, it is in these essentials exactly on the same footing as the mortgage with which we had to deal in the Full Bench and must be held to be not within

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section 9. It therefore is immaterial to consider whether or not it is also excluded by the words "a member of an agricultural tribe makes a mortgage."

Before leaving this point I may note that counsel for the mortgagor respondent contended that by the order of remand of the District Judge to the trial court, after he had held that striking out the condition from the mortgage did not destroy the mortgage altogether but reduced it to a simple mortgage, the question of the applicability of section 9 to this particular mortgage at any rate was concluded, there having been no appeal from that order of remand. The contention is apparently that the District Judge's direction, that the Munsif after determining the amount due should send the case to the Collector under section 9, was a conclusive finding that section 9 was applicable. The result of this would be that we could not discuss whether section 9 was applicable, but would be bound to hold it applicable in the present case; and as the Board of Revenue has refused to hold it applicable the mortgagor would be successful in depriving the mortgagee of all remedy. I am not prepared to hold, however, that there was any issue raised at all before the learned District Judge as to whether section 9 was applicable or not. The Munsif had applied the Act in so far that he had applied section 10. The only question dealt with by the Judge was whether the result arrived at by the Munsif after applying section 10 was correct or not, and the learned District Judge held that it was not. Incidentally he directed the learned Munsif to proceed under section 9, but it was not a necessary part of his order, and though the mortgagee in his grounds of appeal to the District Judge had referred to the applicability of section 10, there is nothing whatever to show that anybody at all, either the parties or the Judge, considered or discussed the issue whether the Act was applicable at all. I

thought it desirable to mention this as the point was argued. I do not think that we are debarred for this reason from considering the applicability of section 9, but I have already held that whatever may be my own opinion I am debarred by the decision of the majority of the Full Bench from applying section 9.

I turn then to the second question whether, assuming the mortgage to be outside section 9 altogether, section 16 can properly be applied to deprive the mortgagee of his right to sell. The scope of section 16 was discussed in the Full Bench case, *Ram Sahai Singh v. Debi Din* (1), to which I have just referred. Mr. Justice WALSH referred to section 16 in a few lines which will be found at the bottom of page 11 and the top of page 12 of the report and Mr. Justice DANIELS at page 13. I myself dealt with section 16 on the hypothesis that the opinion of the majority of the Full Bench must result in holding that the mortgage in question did not come within section 9, though it might be a view with which I was not personally in agreement, and I gave my reasons for holding that, on the hypothesis that the mortgage did not come within section 9, section 16 should not be interpreted to deprive the mortgagee of his right to sell. The order of the court, which will be found at page 25, only concerned the scope of section 9. The scope of section 16 is still, therefore, a question open to us.

I have heard no reason for holding the view which I expressed in the Full Bench case to be mistaken.

As to the classes of mortgage to which it is applicable, section 16 is clearly of retrospective effect; and if the present mortgage comes within the other provisions of the Act there can be no question but that section 16 will apply, at whatever date the mortgage was made, before or after the commencement of the Act. But sec-

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tion 16 must be interpreted, like any section in any Act, in the light of the rest of the Act. The question is, therefore, whether we ought to apply it to all mortgages or whether, upon a consideration of the scheme and intention of the Act as deduced from the Act itself, we are justified in limiting its application, whether retrospective or otherwise, to those mortgages only which are found to be within the general scope of the Act.

It is unnecessary for me to repeat the reasons which I have already recorded in my judgement in that Full Bench. As I appreciate the scheme of the Act and its intention as evidenced by the Act itself, we find first in the opening words of section 6 what I may call the personal considerations with which the Act is concerned, and in the remainder of section 6 and section 9 we find the types of mortgage with which the Act is concerned, and then we have the provision in section 16. It appears to me that the true interpretation of these sections is that the legislature set itself to consider "Who are the types of persons and what are the types of mortgages which we desire to control, and what are the limitations that we will put on the rights of the mortgagee in those cases?" Having laid down the forms which those mortgages must take or the forms into which they must be transformed and having thus secured to the mortgagee the rights which he was to have, they proceeded to deprive the mortgagee by section 16 of the right to bring to sale. I would state this in other words by a simple illustration. The legislature considered the transactions which it desired to control, let us say four types of mortgage, A, B, C and D, and having determined what rights the mortgagee was to have in the cases of those mortgages, it proceeded to say: "Having given the mortgagee the remedies we think he should have, we will now (by section 16) deprive him of his right to sell."

Whether the legislature, in omitting some mortgages from the provisions which it enacted giving in the case of certain mortgages other remedies in place of the right to sell, omitted them by design or accident, one thing at least absolutely certain is that it did not intend by section 16 to deprive any mortgagee of his normal legal rights without giving him what it considered to be an equitable equivalent. It is impossible to conceive that section 16 was intended to apply to cases where the legislature was not giving the mortgagee any other remedies. If, therefore, by intention or by accident a type of mortgage, E or F, was omitted from the clause giving the mortgagee other exceptional remedies, I think we are wholly justified by the recognized canons of interpretation, which I have discussed in my judgement in the Full Bench case, in refusing to apply section 16 and that we should be wrong in applying it. In his judgement in the Full Bench case Mr. Justice WALSH said: "It is a mortgage which is not within the mischief prohibited by section 6. The policy of the Act is to keep out what may be called outsiders". If, as by the decision of the Full Bench I am compelled to hold, the mortgage does not come within the mischief with which the Act deals, I feel not merely inclined but compelled by the relevant canons of interpretation to hold that section 16 is not applicable.

In conclusion I may be permitted to emphasize that there is no conflict between the two views which I hold. The guiding principle underlying both is the same, that section 16 can only be applied where there is a mischief which comes within the Act. If the mortgage comes within sections 6 and 9 and is thereby declared to be within the mischief contemplated by the Act, section 16 is applicable. If the mortgage does not come within sections 6 and 9, it has not been declared to be within the Act and the mischief contemplated by the Act, and

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section 16 is not applicable. The first condition is untenable according to the majority decision of the Full Bench; the second alone remains. Having arrived then at the conclusions that, in obedience to the decision of the majority of the Full Bench, I must hold that this mortgage, deprived *as it at present stands* of its foreclosure clause by the remand order of the District Judge purporting to be passed under section 10 of the Act, which order was allowed by the parties to become final, does not come within the Act and that section 16 does not constitute any obstacle, it would remain to consider to what, if any, relief the decree-holder was entitled.

The remand order of the District Judge, while it struck out the foreclosure clause, held that there was a subsisting mortgage and that could only mean a simple mortgage. On such a simple mortgage, the Act not being applicable, the mortgagee would be entitled to a decree for sale, and, if the matter ended there, I would give him such a decree. I appreciate that as a result of such a sale the property might pass into the hands of an outsider, but the mortgage cannot be held to be outside the mischief of the Act so as to deprive the mortgagee of his remedy under section 9 and to be inside the Act so as to deprive him of his normal remedy, and if the mortgage must be held to be outside the Act in obedience to the majority in the Full Bench case it must be held outside the Act altogether.

But the matter does not end here. Exactly the same reasoning which applies to exclude section 16 from operation to a mortgage not within the scope of the mischief aimed at by the Act applies to exclude the operation of section 10.

The basis of the Full Bench majority decision was that "the policy of the Act is to keep out what may be called outsiders". The giving of effect to this mortgage by granting the mortgagee the foreclosure to which

he was entitled under its terms would not have had the effect of admitting an outsider, the mortgage as it stood was outside the Act, and that being so, section 10 was no more operative than section 16 in the case of a simple mortgage.

It is true that it may be said that both parties rested under the remand order excising the foreclosure clause, but that does not preclude us from exercising the powers reserved to us by section 151 of the Civil Procedure Code to do justice. I am aware that those powers should not be lightly exercised where a litigant had a remedy and did not avail himself of it, but the circumstances of this case and the manner in which the subject has been dealt with by the legislature and the courts are such that it would be grossly unjust to penalize a litigant for his ignorance of what view the courts might take and for not pursuing what might well have seemed to him and his advisers a fruitless course involving further and useless costs.

The result is that I would be prepared to give the mortgagee a decree for sale on the basis that his mortgage as it at present stands is a simple mortgage, or to restore the foreclosure clause and give him a decree for foreclosure.

In view of the fact that, as I understand, my learned brother is not prepared to take the view that the result of the District Judge's order of remand was, as between the parties, to establish a simple mortgage, and in view of the facts that the same reasoning applies to exclude the operation of both section 16 and section 10 and that a decree for foreclosure will exclude the possibility of admitting an outsider, I am prepared to restore the foreclosure clause and give the appellant a decree for foreclosure if the amount due upon the mortgage is not paid before a date to be fixed.

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ASHWORTH, J. :—This second appeal arises out of a suit brought by the plaintiff appellant for foreclosure on a mortgage dated the 27th of June, 1912. The mortgage was a mortgage by conditional sale. The plaintiff sued for foreclosure. Fourteen months after the mortgage was executed Government issued a notification under section 4 of the Bundelkhand Land Alienation Act, U. P. Act No. II of 1903, making the tribe to which both parties to the mortgage belonged an agricultural tribe for the purposes of the Bundelkhand Land Alienation Act.

Section 10 of that Act is as follows :—“In any mortgage of land made after the commencement of this Act any condition which is intended to operate by way of conditional sale shall be null and void.” The Munsif dismissed the suit on the ground that under this section the condition of conditional sale being eliminated, there remained no mortgage. On appeal to the District Judge it was held by him that although the plaintiff could not sue on the mortgage as it stood by reason of section 10, nevertheless he might get the terms of the mortgage revised by the Collector under section 9(1) of the Alienation Act, and the case was remanded to the Munsif in order that the latter might proceed under section 9(3), that is to say might refer the case for action by the Collector under section 9(1). The provisions of section 9 of the Act are as follows :—

“(1) If after the commencement of this Act a member of an agricultural tribe makes a mortgage of his land in any manner or form not permitted by or under this Act, the Collector shall have authority to revise and alter the terms of the mortgage so as to bring it into accordance with such form of mortgage permitted by or under this Act as the mortgagee appears to him to be equitably entitled to claim.



(2) If a member of an agricultural tribe has before the commencement of this Act made a mortgage of his land in which there is a condition intended to operate by way of conditional sale, the Collector shall have authority to put the mortgagee to his election whether he will agree to the said condition being struck out, or to accept, in lieu of the said mortgage, a mortgage in form (a) as provided by section 6, which shall be made for such period not exceeding the period permitted by the said section, and for such sum of money as the Collector considers to be equitable.

(3) If a suit is instituted in any civil court on a mortgage to which sub-section (1) applies, or if a suit for the enforcement of a condition intended to operate by way of conditional sale in a mortgage made before the commencement of this Act is instituted, or is pending at the commencement of the Act, in any civil court against a member of an agricultural tribe, or if any appeal in any such suit is instituted, or is pending at the commencement of this Act, in any civil court other than the High Court, the court shall, if it finds that the mortgage is enforceable or that the mortgagee is entitled to a decree absolute for foreclosure, refer the case to the Collector with a view to the exercise of the power conferred by sub-sections (1) and (2) respectively."

Accordingly the Munsif referred the case to the Collector, but the Collector refused to take any action under section 9 on the ground that it did not apply, the mortgagor not being a member of an agricultural tribe at the date when the mortgage was made. This view was upheld by the Board of Revenue. The appellant then came back to the Munsif who proceeded to grant a decree for sale. I cannot discover what justification the Munsif held to exist for the passing of such an order.

On appeal to the District Judge it was objected that the passing of such a decree for sale on a mortgage by

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conditional sale was contrary to section 67 (a) of the Transfer of Property Act; and that section 16(1) of the Alienation Act forbade the sale of any land belonging to a member of an agricultural tribe.

Ashworth, J. Section 16(1) is as follows :—"No land belonging to a member of an agricultural tribe shall be sold in execution of any decree or order of any civil or revenue court, made after the commencement of this Act."

The District Judge did not consider the first plea, but accepting the second plea held that section 16(1) prevented a decree for sale being operative and therefore no such decree should have been granted.

In this appeal the position taken up is that the District Judge by his order of remand, which was not appealed against, conclusively established that the plaintiff must get a decree on the basis of his mortgage. As section 10 prevented him getting a foreclosure decree and as the refusal of the Collector to proceed under section 9 prevented him getting his mortgage altered and revised, he must be deemed to have a remedy by sale of the mortgaged property.

In reply it is urged :

(a) That the Collector was right in holding that section 9 would not apply on the ground that that section would not apply to a mortgagor who was made a member of an agricultural tribe at a date subsequent to the mortgage, and that in any case the Collector's order, upheld as it was by the Board, is final and cannot be interfered with by this Court.

(b) That a decree for sale cannot be passed, because in the first place no such decree can be passed on a mortgage by conditional sale under section 67(a) of the Transfer of Property Act, and secondly if it was passed it would be inoperative by reason of section 16(1). Consequently the plaintiff has no remedy. His claim

for foreclosure is barred by section 10, his claim for revision of the mortgage by the Collector is barred by the Collector's order and his claim for decree for sale is barred by section 16(1) of the Act, and section 67(a) of the Transfer of Property Act.

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I hold that the Collector's order was wrong even though upheld by the Board. The Act clearly was designed to have retrospective effect. Reference may be made in particular to section 9(2) which allows the Collector to interfere with mortgages executed before the Act came into force. This being so, we must deem that an order under section 4 of the Act, allowing the Local Government to determine what persons are to be deemed to be agriculturists, must also be deemed to have retrospective effect. Under section 21 of the U. P. General Clauses Act, I of 1904, the Local Government could notify additional tribes as agricultural tribes from time to time.

At the same time it is pleaded in this case that even if the Collector's refusal to apply section 9 was incorrect if based on the ground that the Government notification did not have retrospective effect, it was correct on another ground, namely that both the parties to this mortgage were members of the same agricultural tribe, and it has been ruled by a Full Bench in this Court, namely *Ram Sahai Singh v. Debi Din* (1), that section 9 would not apply to a case of a mortgage by one member of an agricultural tribe in favour of another. I may remark that in any case this Court cannot disturb the Collector's finding, as section 22 of the Alienation Act deprives this Court of jurisdiction in any matter which a Revenue Officer is empowered by this Act to dispose of. This must mean that if a Collector decides that he has no jurisdiction to act under section 9(1) and revise a mortgage, this Court cannot question his decision.

(1) (1926) J. L. P., 49 All. 2.

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I also hold it beyond doubt that the plaintiff cannot get a decree for sale. Section 67(a) clearly bars such a decree on a mortgage like this. Nor is there anything in the District Judge's remand order (assuming that we cannot go behind it as it was not appealed against) that can be interpreted to mean that the District Judge held the mortgage to be enforceable only as a simple mortgage decree. What the District Judge in effect said was that although the condition for foreclosure could not operate there was still left a mortgage that could be referred to the Collector. It is not, therefore, necessary to consider whether section 16(1) would prevent the plaintiff getting a decree for sale.

The only question then is whether the plaintiff can get a decree for foreclosure. Apart from the Full Bench decision in *Ram Sahai Singh v. Debi Din* (1) I should hold that he could not, and that his only remedy was revision of the mortgage by the Collector. But that decision, by which I am bound (though I agree with the dissentient judgement in that case of Boys, J., and hold it was wrongly decided), takes away that remedy. It held that section 9 did not refer to a mortgage executed by one agriculturist in favour of another. As it is clear that the legislature could not have intended to deprive a mortgage between two agriculturists of all effect, the logical consequence is that not only section 9 but no section of the Act applies to such a mortgage. Therefore we must hold that section 10 does not apply.

It is true that the District Judge's remand order held it to apply. That order was not appealed from and under section 105(2) of the Civil Procedure Code the appellant cannot now question its correctness. But I hold that this Court can, under its inherent powers to prevent an obvious injustice, refuse to be bound by a finding in a remand order of a subordinate court, even

(1) (1926) I.L.R., 49 All., 8.

though neither party can question it. It would lead to an impossible situation if by section 105(2) of the Civil Procedure Code a High Court were, in an appeal from a decree, to be debarred from taking on a law point a different view from that taken by the District Judge in an interlocutory order. Section 151 is wide enough to prevent such an *impasse*. I would decree the suit with costs throughout and give the plaintiff a decree for foreclosure in the ordinary form, six months being allowed for paying the mortgage money.

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BY THE COURT :—The order of the Court is that the appeal is allowed with costs and the appellant will have a decree in the usual form for foreclosure if the amount of Rs. 669-7-0 found due on September 12, 1923, with interest at 6 per cent. from that date, and the costs, are not paid within six months from the date of the decree.

Before Mr. Justice Mukerji and Mr. Justice Niamat-ullah.  
ANGAN LAL AND OTHERS (DEFENDANTS) v. SARAN BIHARI AND OTHERS (PLAINTIFFS).\*

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February, 28.

Act No. IX of 1872 (Contract Act), section 62—*Novation of contract—Fresh agreement in substitution for existing mortgage—Mortgage not extinguished by mere executory contract to create new mortgage and lease—Ineffective transaction for want of execution and registration.*

A fresh agreement, made between the parties to a mortgage, to substitute for the existing mortgage a new usufructuary mortgage and a lease by the mortgagee, cannot supersede the existing mortgage unless the agreement is completed by the execution and registration of the new mortgage and lease. A mere executory contract, which has to be specifically enforced to bring about the contract which is to be substituted for the old contract, will not supersede a registered mortgage deed by which an interest in immovable property has passed.

Mr. S. C. Das, for the appellants.

\* First Appeal No. 202 of 1927, from a decree of Akbar Husain, Subordinate Judge of Muttra dated the 17th of January, 1927.

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Dr. K. N. Katju, Messrs. N. P. Asthana and K. C. Bhatia, for the respondents.

MUKERJI and NIAMAT-ULLAH, JJ. :—One Jagan Prasad, for himself and as the natural guardian of his three sons, two of whom are among the appellants, executed a mortgage bond for Rs. 10,000 in favour of the ancestors of the respondents to this appeal on the 17th of July, 1915. The suit out of which this appeal has arisen was brought to enforce that mortgage. One of the sons of Jagan Prasad is dead and is represented in this litigation by his wife, Musammat Manbhari, one of the three appellants.

Several pleas were taken in defence, but only three of these are pressed before us, and, therefore, need be noticed. The first plea was that the parties agreed that a certain mortgage transaction should be entered into by the parties in satisfaction of not only the bond in suit but also of another mortgage bond, and, that being the case, the present suit was not maintainable. [The other pleas not being material to this report, are omitted.]

On the first point the learned Subordinate Judge found that there was, no doubt, an agreement that a fresh transaction of mortgage and a lease should be entered into, but he held that no documents creating the lease or the mortgage having been executed and completed, it was open to the plaintiffs to maintain the suit. The learned counsel for the appellants has contended that under section 62 of the Indian Contract Act it is enough if there was an "agreement" to substitute a contract, although no contract was completed in the shape of execution and registration of a mortgage and a lease. We are unable to accept this contention of the learned counsel. In the deed in suit we have a contract and a transfer of property. If this transaction is going to be superseded by a contract, that transaction also must be a completed transaction.

It should be a contract which is enforceable in law. The substitution, as we have said, must be by a contract, and a mere agreement to execute in future a usufructuary mortgage deed and a lease cannot be said to be a contract which was to be substituted in place of the original contract. To put the same thing in different language, the defendants' case is that the bond in suit was to be replaced by a usufructuary mortgage for a sum of Rs. 37,000 which was to be raised under certain circumstances to Rs. 44,000. It was further the case of the defendants that there was to be a lease of the mortgaged property in favour of the defendants. These are transactions which can only reach a stage of completed contract on being executed on stamped documents and on being registered. As we read section 62, there should be an actual substitution of the old contract by a new contract. A mere agreement that there would be, in future, a substitution would not be sufficient to wipe out the mortgage in suit. "Agree to substitute" is equivalent to "agree in substituting." Till the second contract, contemplated, is brought into existence, the old contract will still exist and continue to be enforceable.

Let us take, for example, the illustration which one of us put to the learned counsel for the appellants in the course of the arguments. Suppose that for three years after the completion of the "agreement" relied on by the defendants nobody took any action,—the plaintiffs did not bring any suit for sale and the defendants did not bring any suit for specific performance of the contract. Could it then be argued that, when a suit is instituted after the end of three years, the plaintiffs' mortgage has become extinguished? We think that such an argument would be utterly untenable. We are of opinion that the learned Subordinate Judge was right in holding that a mere executory contract, which has to be specifically enforced to procure the contract which is to be

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substituted for the old contract, would not supersede a registered mortgage deed by which an interest in the property has passed.

[The judgement then proceeded to deal with other pleas and concluded.]

Under these circumstances the appeal fails and it is hereby dismissed with costs.

Before Mr. Justice Ashworth and Mr. Justice Kendall.

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 March, 5.

ACHHAIBAR SINGH (PLAINTIFF) v. RAJMATI AND OTHERS  
 (DEFENDANTS.)\*

Act No. IV of 1882 (Transfer of Property Act), section 65(a)  
 —Transfer of equity of redemption—Covenant of title  
 binding upon transferee—Estoppel.

The implied covenant under section 65(a) of the Transfer of Property Act that the mortgagor has power to transfer the property is one that is binding upon a transferee of the equity of redemption, and the transferee is estopped from pleading that the mortgagor had no right to make the mortgage. *Renga Srinivasa Chari v. Gnanaprakasa Mudaliar* (1), distinguished. *Debendra Nath Sen v. Mirza Abdul Samed* (2) and *Doe v. Stone* (3), referred to.

Mr. P. L. Banerji, for the appellant.

Mr. Haribans Sahai, for the respondents.

ASHWORTH and KENDALL, JJ. :—This second appeal arises out of a suit brought by the plaintiff appellant for sale of certain property on the basis of a mortgage. The property was mortgaged to him by one Behari Das Goshain. The mortgage was a simple mortgage. Subsequently Behari Das sold the equity of redemption to Musammat Rajmati who is the mother of the defendants respondents.

\* Second Appeal No. 699 of 1927, from a decree of C. Deb Banerji, Additional Subordinate Judge of Jaunpur, dated the 11th of February, 1927, reversing a decree of Banwari Lal Mathur, Munsif of Shahganj, dated the 30th of April, 1926.

(1) (1906) I.L.R., 30 Mad., 67.

(2) (1909) 10 C.L.J., 150.

(3) (1846) 3 C.B., 176.



One plea taken in defence was that the property being *waqf* property, Behari Das, the mortgagor, was not entitled to mortgage it. This plea was repelled by the trial court on two findings. One finding was that the property was not *waqf* property, and the second was that in any case the defendants, having obtained possession of the property from their mother who got the equity of redemption from Behari Das, were estopped under section 65(a) of the Transfer of Property Act from denying the right of Behari Das to mortgage the property.

In first appeal the Subordinate Judge set aside the finding of the trial court as to the property being *waqf* property. Whether he considered the plea of estoppel is not clear. He has made some remarks which appear unintelligible and at any rate have not been relied upon by the respondents' counsel and with good reason.

In this second appeal the main point taken is that the respondents were in possession through their mother and any interest acquired by their mother was the interest of Behari Das as it existed subsequent to the mortgage. Therefore, neither their mother nor the defendants themselves can take up a position which it was not open to Behari Das as mortgagor to take. Now Behari Das either had or had not power to make the mortgage. Assuming that he had not power, still he could not, in a suit by the mortgagee, take up the position that he had no power to transfer the property by mortgage. That is clearly barred by section 65(a) of the Transfer of Property Act. His successors in interest are in no better a position.

Respondents' counsel has attempted to argue in two ways. [The first, not being material to this report, is omitted.]



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A second argument is that the estoppel referred to in section 65(a) of the Transfer of Property Act is an estoppel that will only operate personally against the mortgagor and not against a subsequent transferee of the mortgagor. In support of this contention we are referred to the case of *Renga Srinivasa Chari v. Gnanaprakasa Mudaliar* (1). It was there held that the implied contract mentioned in section 65(c) of the Transfer of Property Act that the mortgagor will pay all public charges accruing due in respect of the mortgaged property so long as the mortgagee is not in possession is an implied contract which will not be binding on a subsequent transferee of the equity of redemption. Whether that case was rightly decided on this point it is unnecessary to consider, because the liability to pay public charges would arise subsequent to the mortgage. The implied contract that the mortgagor has a right to sell the property that he mortgages is one that arises at the moment of the execution of the mortgage. It has been held in *Debendra Nath Sen v. Mirza Abdul Samed* (2), wherein reliance is placed on the English case of *Doe v. Stone* (3), that it is no more open to a person standing in the shoes of the mortgagor than to the mortgagor himself to set up as against the mortgagee any preceding estate which he himself had created. That is to say that a successor in interest of the mortgagor cannot deny that the estate which he mortgaged was vested in him. We would also refer to the last paragraph of section 65 of the Transfer of Property Act which mentions that the right of a mortgagee to take advantage of the implied contract stated in section 65 can be enforced by every successor in interest of the mortgagee. This provision would be of no effect if it was only the mortgagor personally against whom it could be invoked.

(1) (1906) I.L.R., 30 Mad., 67 (71). (2) (1909) 10 C.L.J., 150 (164).

(3) (1846) 3 C.B., 176.

For the above reasons we accept this appeal and restore the decree of the trial court with costs to the appellant.

Before Mr. Justice Mukerji and Mr. Justice Niamat-ullah. 1929  
March, 6.  
MAHADEO BHARTHI (PLAINTIFF) v. MAHADEO RAI  
AND ANOTHER (DEFENDANTS).\*

*Act No. XIV of 1920 (Charitable and Religious Trusts Act), sections 5 and 6—Denial of trust—Order holding that trust exists and calling for accounts—Decision whether conclusive as to existence of trust—Subsequent suit for declaration that the property is not held in trust—Jurisdiction.*

On an application under section 3 of the Charitable and Religious Trusts Act, 1920, the opposite party denied the existence of the alleged trust. He, however, did not give the undertaking, mentioned in section 5(3), to institute within three months a suit for declaration. The District Judge, after making an inquiry, passed an order holding that there was a trust to which the Act was applicable and directing the opposite party to render accounts. About a month later, the opposite party filed a regular suit for a declaration that the property was his personal property and not subject to any trust to which the Act could apply. On the question whether the suit was maintainable, *held—*

*Per NIAMAT-ULLAH, J:—*Act XIV of 1920 nowhere provides expressly or impliedly that the order of the District Judge passed under section 5 is conclusive as to the existence of a trust falling within the scope of the Act, and cannot be challenged in a regular suit before a court of competent jurisdiction; nor does the order fulfil all the requirements of the rule of *res judicata*, so as to be a bar to the subsequent suit.

If the alleged trustee fails to avail himself of the opportunity given by section 5(3) of the Act to bring a suit before the order is passed by the District Judge, he no doubt subjects himself to two disadvantages, namely (1) that a suit under section 92 of the Civil Procedure Code can be brought against him without the permission of the Advocate-General, and (2) that he becomes bound to submit accounts for the last three

\*First Appeal No. 133 of 1926, from a decree of Raj Behari Lal, Subordinate Judge of Ghazipur, dated the 16th of January, 1926.

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years; but it remains open to him to invoke the jurisdiction of a competent court to decide the question of title as to whether he holds the property in his own right or as a trustee of a trust within the scope of the Act.

*Per* MUKERJI, J. :—The maintenance of a suit so as to nullify the effect of section 6 of the Act is not permissible.

The Act offers an ample chance, before the order is passed by the District Judge, for a regular suit being instituted for the determination of the question whether the property is or is not trust property; but if this opportunity is not availed of and an adverse order is passed by the District Judge, the result is that a non-compliance with it is, by section 6, deemed to be a breach of trust. If, thereafter, the subsequent suit is successful, the result would be two conflicting positions.

Dr. K. N. Katju and Messrs. P. L. Banerji and Shah Zamir Alam, for the appellant.

Messrs. B. Malik and Shiva Kumar Roy, for the respondents.

NIAMAT-ULLAH, J. :—The suit out of which the present appeal has arisen was brought by the plaintiff appellant Mahadeo Bharti in the court of the Subordinate Judge, Ghazipur, for a declaration that the property specified in list A annexed to the plaint is his private property in absolute ownership, and in the alternative for a declaration that it is not held in trust created for public purposes of a charitable or religious nature governed by Act XIV of 1920. It was necessitated by an order, dated the 31st of August, 1925, passed by the District Judge of Ghazipur under section 5 of Act XIV of 1920 (Charitable and Religious Trusts Act), declaring the property in dispute to be held in trust of a charitable and religious nature existing for public purposes. Mahadeo Rai *alias* Mool Bharti and Sheo Prasad Pandey, the respondents to this appeal, were impleaded as defendants to the action, as the aforesaid order was obtained by them on their application for examination of accounts of the alleged trust property.

The defendants put forward two main defences, viz. (1) that the suit is not maintainable in view of the order of the District Judge, already referred to, and (2) that the properties in question are in fact held by the appellant in trust for public charitable and religious purposes, being dedicated to the Math of Sanyasis at Nasirpur.

The lower court ruled that the suit before it was not barred by the order of the District Judge, but held on the merits that the trust set up by the defendants has been established. The plaintiff's suit was accordingly dismissed.

At the hearing of the appeal the plea in bar of the suit was reiterated by the defendants. This, being in the nature of a preliminary objection going to the root of the case, should be first examined and the appeal can be considered on facts if that plea fails.

On a careful consideration of the provisions of Act XIV of 1920, I am of opinion that the plea has no force.

The object of the Act is "to provide a more effectual control for the administration of charitable and religious trusts." The scope of the Act, as stated in the Pre-amble, is "(1) to provide facilities for the obtaining of information regarding trusts created for public purposes of a charitable or religious nature and (2) to enable the trustees of such trusts to obtain the directions of a court on such matters and to make special provision for the payment of the expenditure incurred in certain suits against the trustees of such trusts."

Section 3 enables one interested in the trust to obtain from the court an order: "(1) directing the trustee to furnish the petitioner through the court with particulars as to the nature and objects of the trust and of the value, condition, management and application of the subject-matter of the trust, and of

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the income belonging thereto, or as to any of these matters, and (2) directing that the accounts of the trust shall be examined and audited: Provided that no person shall apply for any such direction in respect of the accounts relating to the period more than three years prior to the date of the petition."

The petition shall specify, as far as may be, the particulars of the audit which he seeks to obtain (section 4).

The court, if satisfied *prima facie* that the alleged trust exists, shall fix a date for hearing, calling upon the trustee to show cause [section 5(1).]

Section "5(2). On the date fixed for the hearing of the petition . . . the court shall proceed to hear the petitioner and the trustee, if he appears, . . . and shall make such further inquiries, if any, as it thinks fit. The trustee may, and if so required by the court shall, at the time of the first hearing or within such time as the court may permit present a written statement of his case. . . .

(3) If any person appears at the hearing of the petition and either denies the existence of the trust or denies that it is a trust to which this Act applies, and undertakes to institute within three months a suit for a declaration to that effect and for any other appropriate relief, the court shall order a stay of the proceedings, and if such suit is so instituted, shall continue the stay until the suit is finally decided.

(4) If no such undertaking is given, or if after the expiry of the three months no such suit has been instituted, the court shall itself decide the question.

(5) On completion of the inquiry provided for in sub-section (2), the court shall either dismiss the petition or pass thereon such other order as it thinks fit:

Provided that, where a suit has been instituted in accordance with the provisions of sub-section (3), no order shall be passed by the court which conflicts with the final decision therein.

(6) Save as provided in this section the court shall not try or determine any question of title between the petitioner and any person claiming title adversely to the trust."

Section "6. If a trustee without reasonable excuse fails to comply with an order made under sub-section (5) of section 5, such trustee shall, without prejudice to any other penalty or liability which he may incur under any law for the time being in force, be deemed to have committed a breach of trust affording ground for a suit under the provisions of section 92 of the Code of Civil Procedure, 1908; and any such suit may, so far as it is based on such failure, be instituted without the previous consent of the Advocate-General."

Section 7 enables a trustee to obtain "opinion, advice or direction of the court on any question affecting management or administration of the trust property and the court shall give its opinion, advice or direction, as the case may be, thereon: provided that the court shall not be bound to give such opinion, advice or direction on any question which it considers to be a question not proper for summary disposal." The court is to give opportunity to all interested persons of being heard before giving such opinion, advice or direction [sub-section (3) of section 7.]

Section 8 empowers the court to make appropriate orders for payment of costs etc., from the income of the trust property.

Section 11 makes certain provisions of the Code of Civil Procedure applicable to proceedings under this Act

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and declares that the provisions of that Code relating to execution of decrees shall apply to the execution of orders as to costs etc., under this Act.

Section 12 enacts that "no appeal shall lie from any order passed or against any opinion, advice or direction given under this Act."

I have summarized the entire framework of the Act which consists only of twelve sections and have quoted in full the provisions with which we are immediately concerned. It is quite clear to my mind that it provides a summary remedy to persons interested in public trusts of a religious or charitable nature to obtain, through court, information relating to the disposal of income from trust property. The District Judge can exercise his powers only if he is satisfied that the trust is of such a character as would make the provisions of that Act applicable. It is not the object of the Act to obtain to obtain decision of questions relating to the very existence of such trusts, except in so far as it may be necessary for the District Judge to ascertain if he has jurisdiction under the Act. The provision which entitles a person to obtain determination of the question whether the trust exists is for his benefit; and if the alleged trustee denies the existence of the trust and desires determination of that question by a court of competent jurisdiction, it is imperative that the District Judge should give him a reasonable opportunity of doing so. If he fails to avail of that opportunity, he must abide by the decision of the District Judge on that question passed in a summary proceeding and for a given purpose, viz., that the person applying for inspection and examination of accounts should inspect and examine, through court, the accounts, for a period not exceeding three years, relating to the trust property. By not availing himself of the opportunity which the Act affords him to obtain the determination of such a disputed question by a competent



court the alleged trustee subjects himself to two disadvantages, viz. (1) a suit under section 92 of the Civil Procedure Code can be instituted against him without the formality of the permission of the Advocate-General, —a corresponding advantage conferred upon the person interested in the trust who moved the court and who could not otherwise have instituted a suit under section 92 without the preliminary sanction of the Advocate-General, and (2) the alleged trustee must submit to the examination of his accounts as ordered by the District Judge, without any further objection on the ground that the property in his hands was not held in trust for a public religious or charitable nature. Till such time that he is armed with a declaration by a court of competent jurisdiction that the property is not so held by him, he will continue to be subject to the provisions of Act XIV of 1920. He will also continue liable to be sued under section 92 of the Civil Procedure Code, which suit if instituted may result in his removal or in the court having jurisdiction giving certain directions or imposing conditions on his continuing to hold the office of the trustee if he is found to be one. But it is always open to him to invoke the jurisdiction of a court competent to entertain suits relating to questions of title and obtain a declaration of his right to the property if he is otherwise entitled to it.

The argument, that a regular suit instituted after the alleged trustee failed to institute a suit for which permission had been granted to him under section 5 of Act XIV of 1920 is not maintainable, is not based on any rule of law contained either in that Act or in any other enactment. It must be conceded that there is no express provision of law to that effect. There is no implication of bar arising from any part of Act XIV of 1920. The Act nowhere provides expressly or impliedly that

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the order of the District Judge passed under section 5 is conclusive and cannot be challenged in a regular suit before a court of competent jurisdiction. The consequences ensuing from such an order have already been mentioned. It is an elementary rule of law that a plea in bar can be allowed to succeed only where the law expressly provides for it or the implication is so irresistible that its provisions are inconsistent with a contrary hypothesis. The test, in my opinion, is whether the order of the District Judge passed under section 5 of Act XIV of 1920 fulfils all the requirements of the rule of *res judicata* as contained in section 11 of the Code of Civil Procedure. If it does not, the subsequent regular suit is not barred and is maintainable. Assuming that the question whether a trust of a public religious or charitable nature exists as regards the property in dispute was a question not merely incidentally in issue but was directly and substantially in issue before the District Judge exercising his powers under Act XIV of 1920, which I greatly doubt, the proceedings before the District Judge were not proceedings in "suit" in which he could pass any decree in favour of any of the contending parties. His order, as regards *res judicata*, is no better than one passed in any miscellaneous proceedings. The District Judge may well decide under section 5, Act XIV of 1920, that no trust exists and may dismiss the application for examination of accounts relating to the alleged trust property. It seems to me that the applicant may, in that case, institute a declaratory suit or a suit under section 92 of the Code of Civil Procedure with the permission of the Advocate-General, challenging the order of the District Judge, which cannot bar such a suit. It is not logical to maintain that the order is not conclusive against him but is conclusive against the alleged trustee if he is found by the District Judge to be a trustee. Looking to the summary character of the pro-

ceedings, it is not conceivable that the legislature should have intended to give conclusive effect to the order passed by the District Judge under section 5, Act XIV of 1920. It will be observed that he is not obliged to hear all such evidence as the parties may adduce. He is at liberty to hear such evidence as he "thinks fit". The provisions of the Civil Procedure Code regarding the mode of recording evidence have not been made applicable to the proceedings under the Act. Many other provisions of that Code of a salutary nature are not applicable to proceedings under the Act. The District Judge has the last word on the subject. No appeal lies from his orders under it.

I do not think that any embarrassing results would ensue, if the subsequent regular suit is held maintainable, because of two so-called inconsistent positions, viz. (1) the trustee being "deemed to have committed a breach of trust affording ground for a suit under the provisions of section 92 of the Code of Civil Procedure" and (2) the decree in the subsequently instituted regular suit, if successful, declaring that the claimant is not a trustee at all. Technically a suit under section 92, Civil Procedure Code, will lie without the permission of the Advocate-General, as provided by section 6 of Act XIV of 1920, in spite of a decree declaring the right of ownership of the claimant alleged to be trustee. If in spite of such a decree any one takes it upon himself to institute a frivolous suit under section 92 of the Civil Procedure Code, he may do so and take the consequences. As pointed out by me already, the effect of a person failing to institute the suit is no more than to relieve a person or persons interested in the trust of the necessity of obtaining the permission of the Advocate-General for instituting a suit under section 92 of the Civil Procedure Code and to subject the alleged trustee to the harrassment of having his accounts inspected, though he is in fact not a trustee. After he has obtain-

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ed a decree of a competent court declaring his right of ownership, any subsequent application under section 3 of Act XIV of 1920 will have to be dismissed on production of a copy of such a decree at the initial stage provided for by section 5 (1) of that Act. It should be borne in mind that the Act does not empower the District Judge to pass any order directing the alleged trustee to do something of a recurring nature. He can order the examination of his accounts for three years. Such an order has to be obtained afresh on every subsequent occasion and the District Judge may or may not pass it according as the circumstances proved before him justify it or not.

Any argument based on analogy drawn from the provisions of sections 199 and 202 of the Agra Tenancy Act of 1901 is unsound. It should not be overlooked that those sections refer to questions of proprietary right arising in suits for ejectment against an alleged tenant. Power has been conferred upon the revenue court to determine questions of proprietary title on failure of a party to institute within three months a suit in a civil court for determination of such question. The decree passed in such a suit operates as *res judicata*. The essential distinction between a decree passed by a revenue court under sections 199 and 202, if conditions giving it the jurisdiction to decide questions of proprietary title exist, and an order of the District Judge under section 5, Act XIV of 1920, is that the former is a decree passed by a court of competent jurisdiction, whereas the latter is only an order passed in summary proceedings, which order has not the force of a decree and has the effect of merely withdrawing certain restrictions imposed on the persons desirous of instituting suits under section 92 of the Code of Civil Procedure.

For the reasons detailed in the foregoing paragraphs I entertain no doubt that the suit out of which the pre-

sent appeal has arisen is maintainable and was rightly tried out on the merits.

As regards the existence of a trust of a religious or charitable character, I have no hesitation in accepting the finding arrived at by the court below. [The judgment then discussed the evidence and continued.]

Considering all the circumstances of the case as they appear from oral and documentary evidence, I am of opinion that the finding of the learned Subordinate Judge that the property in dispute is not held by the plaintiff appellant in private ownership, and that it is property belonging to *math* Nasirpur of which the plaintiff appellant is the mahant, is correct.

In view of my finding stated above, I dismiss this appeal with costs.

MUKERJI, J. :—There are two points in this appeal. The first point is one of law, and is whether the suit is at all maintainable.

The appellant, who was the plaintiff in the court below, was called upon, at the instance of the defendants in the suit, to furnish an account of certain properties which were described by the then applicants as *waqf* property to which Act XIV of 1920 applied, namely, property endowed for public purposes of a charitable or religious nature. The plaintiff appeared in answer to the notice issued by the learned Judge and pleaded that the property in his hands was not at all *waqf*. The learned District Judge allowed an adjournment. The plaintiff did not give an undertaking to institute a suit within three months, as he could do, under sub-section (3), section 5, of Act XIV of 1920. The application was heard and tried on its merits, on such evidence as the learned District Judge had before him. He held that the property was *waqf* and belonged to a *math* and the present plaintiff was bound to render accounts. This.

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was on the 31st of August, 1925 (see page 81 of the record). Thereupon, on the 29th of September, 1925, the plaintiff instituted the suit out of which this appeal has arisen, on the allegation that the property was the personal property of his spiritual ancestors through whom he inherited and of himself, and that in any case there was no trust created for public purposes of a charitable or religious nature governed by Act XIV of 1920.

The defence was that the suit was not maintainable and that the property appertained to a *math* and was of a character to which Act XIV of 1920 applied.

The learned Subordinate Judge, on the point of law, held that the suit was maintainable. On the question of fact he held that the property was *math* property held by the defendant as trust property for public religious and charitable purposes. The learned Subordinate Judge did not use the word "public" in the concluding portion of his judgement, but that is, I understand, what he meant.

The first question is whether the suit is maintainable, for if the suit is not maintainable the appeal must fail, whatever may be the finding on the issue of fact.

If we examine the entire Act XIV of 1920, we shall easily find the whole scheme and object of the Act. The Act starts by saying that it is expedient to provide facilities for obtaining of information regarding trusts created for public purposes of a charitable or religious nature and to enable trustees to obtain directions of the court. Then it says that any person having an interest in any express or constructive trust created or existing for a public purpose of a charitable or religious nature, may apply by petition to a District Judge for several purposes. Among these purposes is one to call upon the trustee to submit accounts to be examined and audited. Section 5 then says that the court, on receipt of an application,

may take some preliminary evidence to satisfy itself on certain points, mainly directed towards finding out whether the application is a proper one or not. The court, if it is satisfied as to the *bona fides* of the application, would issue a notice to the other side. The opposite party then might come and either admit the allegations and agree to submit the accounts, or deny the existence of a trust, or, admitting the trust, may deny that it is for public purposes of a charitable or religious nature. The opposite party may, if he likes, either submit to an inquiry by the court or may offer to institute a suit for a declaration in support of his case. If he offers to institute a suit, the court is bound to stay its hand and ultimately dispose of the application in accordance with the result of the suit. If, however, no offer is made to institute a suit, or the offer made is not carried out by the institution of a suit within three months, the court is bound to determine the question before it. As a result of the court's inquiry, the court will either dismiss the application or pass such order as it thinks fit. If the court decides against the opposite party and calls on him to submit an account and if he fails to submit an account, the consequence that would follow would be that the opposite party would "be deemed to have committed a breach of trust affording ground for a suit under section 92 of the Code of Civil Procedure, 1908". The section then further provides that for the institution of such a suit, previous consent of the Advocate-General would not be necessary. We find, therefore, that the result of an adverse order by the District Judge is that the opposite party is, by law, to be deemed to have committed a breach of trust. This charge against the opposite party necessarily involves two findings, namely that the property in respect of which an order for account is passed is trust property of the nature to which Act XIV of 1920 applies, and that the opposite party,

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by failing to submit accounts, has committed a breach of trust so as to justify the maintenance against him of a suit under section 92 of the Civil Procedure Code.

*Mukerji, J.* Now, if no offer is made to institute a suit under section 5, sub-section (3), or if an offer having been made is not complied with, and if as the consequence of an order for furnishing account being disputed the consequences will follow, what would be the result if, in a subsequent suit instituted by the opposite party to the application before the District Judge, he succeeds in his suit? The result would be that there would be two conflicting positions. On the one hand, a justifiable ground has come into existence for the maintenance of a suit against the opposite party and it will be taken as settled that he has committed a breach of trust. On the other hand there is the declaration given, in the subsequent suit, that the opposite party (the plaintiff in the subsequent suit) is not liable to render an account at all and, therefore, no suit can be maintained against him under section 92 of the Civil Procedure Code.

This is a position which is hardly imaginable. On the other hand, the scheme of the Act offers an ample chance for a regular suit being instituted for the determination of the question whether the property is or is not an endowed property for a public purpose of a charitable or religious nature. The District Judge is required to satisfy himself on the points before he issues notice. Then the opposite party is given a chance to have the matter litigated through the proper courts. In the circumstances that have happened in this case, the plaintiff appellant has not availed himself of his opportunity of instituting a suit, and now that an order has been made against him he brings a suit. As I have already pointed out, what would be the position of the plaintiff appellant if his suit succeeds? How will he be able to wipe out

the consequences which have followed under section 6 of Act XIV of 1920? If the decree in his favour cannot wipe out the consequences provided by section 6 of Act XIV of 1920, the subsequent decree in his favour is useless. I cannot conceive that a party is to have two chances at a regular litigation in the courts, one under section 5, sub-section (3), of Act XIV of 1920 and another, at any time thereafter, as and when he chooses. If one can institute a suit at any time he likes, what is the good of giving three months' time as provided by sub-section (3) of section 5 of the Act?

Sections 199 and 202 of the Agra Tenancy Act of 1901 contained a similar provision as to institution of a suit. It was held that if no suit was instituted within the time allowed, a suit instituted after the three months' time allowed was to be treated as time-barred. The ordinary period of limitation was held to be suspended. See *Banwari Lal v. Mst. Gopi* (1), also *Ganga Chamar v. Bindeshri Rai* (2).

Without deciding, definitely, the question of limitation, I am decidedly of opinion that the maintenance of a suit so as to nullify the effect of section 6 of Act XIV of 1920 is not permissible.

On the merits I agree with my learned brother that the plaintiff has failed to prove the case set up by him.

In the result, I agree in dismissing the appeal with costs.

(1) (1907) I.L.R., 30 All., 44.

(2) (1925) I.L.R., 47 All., 904.

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March, 7.

Before Mr. Justice Sulaiman and Mr. Justice Kendall.

RAMESHAR PRASAD (PLAINTIFF) v. GHISIAWAN  
PRASAD AND OTHERS (DEFENDANTS).\*

*Act (Local) No. XI of 1922 (Agra Pre-emption Act), sections 5, 14 and 15—Ambiguous entry of right of pre-emption—"Refusal to purchase"—Estoppel by conduct.*

Section 5 of the Agra Pre-emption Act is mandatory and its object is not to find out the particulars or the incidents of the rule of pre-emption but to lay down the test as to whether a rule of pre-emption should be held applicable to the village or not. However vague the rule may be and in whatever imperfect form it may be recorded, if it amounts to a declaration recognizing the right of pre-emption, it would fulfil the conditions required by section 5. Once a right of pre-emption is deemed to exist, the rule of pre-emption embodied in section 12 will prevail.

Sections 14 and 15 of the Agra Pre-emption Act are not exhaustive and do not lay down the only rule of estoppel which can operate in pre-emption cases. A waiver of the right of pre-emption can also be inferred from a clear, unambiguous and absolute refusal to purchase. So, where the plaintiff, on being asked by the vendor to purchase the property on certain terms, refused, saying he had no money and could not raise it even by borrowing, but said nothing about reserving his future right of pre-emption, and a few days later the property was sold to a third person without giving any previous intimation of the sale and its terms to the plaintiff, it was held that the plaintiff was estopped from claiming to pre-empt the sale. *Subhagi v. Muhammad Ishak* (1), *Kanhai Lal v. Kalka Prasad* (2) and *Munawar Husain v. Khadim Ali* (3), not approved. *Naunihal Singh v. Ram Ratan* (4), *Nathi Lal v. Dhani Ram* (5) and *Shamsher Singh v. Piari Dat* (6), distinguished. *Ranjit Singh v. Bhagwati Singh* (7), approved.

Dr. K. N. Katju and Mr. N. P. Asthana, for the appellant.

\* First Appeal No. 407 of 1926, from a decree of S. Maitra, Additional Subordinate Judge of Basti, dated the 30th of April, 1926.

(1) (1884) I. L. R., 6 All., 463.	(2) (1905) I. L. R., 27 All., 670.
(3) (1908) 5 A. L. J., 321.	(4) (1916) I. L. R., 39 All., 127.
(5) (1917) 15 A. L. J., 315.	(6) (1918) I. L. R., 40 All., 690.
(7) (1926) I. L. R., 48 All., 491.	

Mr. *Harnandan Prasad*, for the respondents.

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SULAIMAN and KENDALL, JJ.:—This is a plaintiff's appeal arising out of a suit for pre-emption. The property in dispute was sold under a sale deed dated the 18th of March, 1924, for Rs. 30,000. The plaintiff claimed that under section 5 of the Agra Pre-emption Act which governs this transaction he had a right of pre-emption. The main defence to the suit was a denial of any right of pre-emption in that village, and also a plea that the plaintiff was estopped from pre-empting the property on account of a previous refusal. The learned Subordinate Judge has found both the points against the plaintiff and has dismissed the suit.

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We are not prepared to accept the view of the court below that there is no right of pre-emption in this village. In the *wajib-ul-arz* 1292F. (1885), under the heading "custom of pre-emption" we have an entry which has been translated by the official translator as follows:—"At the time of transfer of the property of any co-sharer other co-sharers have a right of pre-emption according to the rule and custom." This translation omits one word which has been read by the learned Subordinate Judge as "*mazhab*", meaning religion. The entry would then read "according to the rights and usage of religion". The learned advocate for the appellant says that the word is "*dehi*" i.e., village, and says that the rights and usage of the village are referred to. We have not the original before us, but only a certified copy. If the word is "village" then the learned advocate for the respondents concedes that the case would come directly under section 5 of the Act. Assuming that the word is "religion," there is undoubtedly a record of a right of pre-emption accruing on a transfer, according to the rights and usage of religion.

Section 5 provides that if the village records a custom, contract or declaration recognizing, conferring

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or declaring a right of pre-emption expressly or by necessary implication, whatever its extent and in whatever form it may be expressed, or imposing on a co-sharer desiring to transfer his interest in land an obligation to offer it to other co-sharers, or forbidding co-sharers to transfer their interest in land to persons other than co-sharers, the right shall be deemed to exist; and under sub-clause (2) such a record is conclusive evidence of the existence of such right. The section is thus mandatory. The object of the section is not to find out the particulars or the incidents of the rule of pre-emption, but merely to lay down the test as to whether a rule of pre-emption should be held to be applicable to the village or not. Once a rule of pre-emption prevails, that rule must be the one embodied in section 12. It is therefore wholly immaterial for the purposes of the applicability of section 5 to inquire into the constitution of the village or the class of co-sharers which existed at the time when the *wajib-ul-arz* was prepared. If the *wajib-ul-arz* does record a declaration recognizing a right of pre-emption, howsoever limited in its scope, the entry is conclusive. Of course if the entry in a *wajib-ul-arz* expressly declares that no right of pre-emption exists or by necessary implication it negatives the existence of such a right it would be difficult to say that there is a right. On the other hand, however vague the rule may be and in whatever imperfect form it may be recorded, if it amounts to a declaration recognizing the right of pre-emption, it would fulfil the conditions required by section 5. In the present case if the right had been confined to the rights and usage of any particular religion according to which such right could not exist, e.g., the Hindu religion or the Christian religion, there would have been a contradiction in terms, and we might have been compelled to hold that the entry by necessary implication negated the existence

of such a right. But the rule is not limited in that way. In these provinces the rule of pre-emption according to the Muhammadan law is quite common. The Muhammadan religion is at least one religion according to which a right of pre-emption can be exercised. The entry, therefore, is not absolutely a contradiction in terms, and although it is ambiguous it is capable of a meaning, viz., to lay down a rule of pre-emption according to the Muhammadan law. We therefore think that it is impossible to take this case out of the language in sub-clause (a) of section 5, and we must hold that this village does record a declaration recognizing a right of pre-emption. That being so, it is a conclusive proof of the existence of a right of pre-emption according to the rule laid down in section 12 of the Act. The defendant vendee is admittedly a stranger and the plaintiff would therefore have a right of pre-emption if there were no bar of estoppel.

We however agree with the court below that in this particular case the plaintiff is estopped from pre-empting this property. The refusal of the plaintiff is based principally on the statement of Mr. Stern, who was examined on commission. The answers to the interrogatories served on him are to be found on pp. 8 to 17 of the supplementary book. He has no longer any interest left in this property, and the learned Judge has believed his statement in spite of the plaintiff's denial. We therefore accept the statement of Mr. Stern as regards the circumstances preceding the sale. According to him there was a contract of sale of the village in various shares with different purchasers. Some of them made the purchases, but others got further indulgence from time to time. The plaintiff Rameshar Prasad was one of these and had purchased a one-anna share. Another prospective purchaser was Kishen Prasad

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Singh who wanted to take 3 annas 6 pies. Kishen Prasad Singh had been given time which had been extended by four days more. On the fourth day, i.e. the 4th of March, 1924, Kishen Prasad along with Rameshar Prasad (plaintiff) went to Mr. Stern and asked for further time, but Mr. Stern refused to give any more time. Then he asked Rameshar Prasad to purchase that  $3\frac{1}{2}$  annas or any portion of it at the same price which was settled with Kishen Prasad, but Rameshar Prasad answered that with great difficulty he managed to borrow money for purchasing 1 anna share and that it was impossible for him to raise any further sum to purchase another share. It was after this refusal that Mr. Stern negotiated with Ghisiawan Pandey and Mahadeo Pandey, the vendees, and accepted their earnest money on the 6th of March, 1924. The sale actually took place on the 18th of March. We accept this statement as substantially embodying what actually happened.

The learned advocate for the plaintiff contends that there can be no absolute refusal so as to operate as an estoppel unless there first has been a definite contract settled, with a definite vendee, for a definite price, of the sale of a definite property and that no amount of refusal before such a complete contract can deprive the pre-emptor of his right of pre-emption. He strongly relies on a number of earlier cases of this Court which no doubt lay down the rule in those broad terms. We may refer to the cases of *Subhagi v. Muhammad Ishak* (1), *Kanhai Lal v. Kalka Prasad* (2), *Munawar Husain v. Khadim Ali* (3), and other cases referred to therein. With great respect, we would say that the rule was laid down too broadly in these cases. There can be an estoppel under section 115 of the Indian Evidence Act if the refusal of the plaintiff has prejudiced the predecessor or the vendee and has induced them to act upon such representation

(1) (1884) I. L. R., 6 All., 463.

(2) (1905) I. L. R., 27 All., 670.

(3) (1908) 5 A. L. J., 331.

and to compromise their position. We do not see why there should not be a personal estoppel against the plaintiff on account of his own previous conduct and unambiguous declaration.

The learned advocate for the respondents has invited our attention to subsequent rulings of this Court where it has been laid down that in cases where the custom requires an offer to be made to the co-sharers in the first instance such a custom is complied with as soon as the offer has been made, even though no definite contract with a prospective purchaser has yet been made. We may refer to the cases of *Naunihal Singh v. Ram Ratan* (1), *Nathi Lal v. Dhani Ram* (2) and *Shamsher Singh v. Piari Dat* (3). But these cases turned on the particular language of the *wajib-ul-arz* which recorded the custom. Of course, if a custom merely requires that an offer should be made to the co-sharers before a share is sold, the prospective vendor fulfils the condition by making the offer and obtaining refusal. Under such a custom it is no part of his duty to go back once more to the co-sharers, after he has entered into a contract, to obtain their refusal.

The present case is governed by the Agra Pre-emption Act. Sections 14 and 15 lay down a rule under which notice can be given to co-sharers and cases where the right of pre-emption may be extinguished. Section 14, sub-clause (2) clearly provides that the notice should describe the property to be sold and the name of the vendee and the price settled. But, in our opinion, these two sections are not exhaustive and do not lay down the only rule of estoppel which can operate in pre-emption cases. That the section is not exhaustive has been held in the case of *Ranjit Singh v. Bhagwati Singh* (4). With that view we agree. If a notice as prescribed in section 14 has been given, a mere failure

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(1) (1917) I. L. R., 39 All., 127.

(2) (1917) 15 A. L. J., 315.

(3) (1915) I. L. R., 40 All., 690.

(4) (1926) I. L. R., 48 All., 491.



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to reply would extinguish the right; but it does not follow that if no such notice has been given, there can never be a case in which there may be a similar estoppel.

In our opinion every case must be considered on its own facts. A mere refusal to purchase need not in every case amount to a waiver of the right of pre-emption. A co-sharer may not be prepared to take the sale direct, but may well be prepared to pre-empt the property in case it is sold to a stranger. On the other hand a waiver of the right of pre-emption can also be inferred from a clear, unambiguous and absolute refusal to purchase the property in any event. It seems to us that if a co-sharer wishes to preserve his right of pre-emption in case of a sale he should not merely refuse to purchase the property on the ground that he had no means to purchase it, but he should make it clear that he is reserving his right of pre-emption. He cannot be allowed to use unambiguous language indicating an absolute refusal and yet make a mental reservation in his favour to the prejudice of the vendor.

In the present case we are satisfied that the statement made by the plaintiff Rameshar Prasad to Mr. Stern, under the special circumstances of this case and having regard to what had happened previously, amounted to an absolute refusal on his part to take the property on the ground that it was impossible for him to raise the money. This flat refusal induced Mr. Stern to enter into negotiations with the vendees, who acting upon such representation believed that Rameshar Prasad had waived his right of pre-emption and that there was no longer any fear of such a suit. In our opinion the plaintiff is now estopped from going behind his refusal and claiming a right to pre-empt the property.

We accordingly uphold the decree of the court below and dismiss this appeal with costs.

Before Mr. Justice Sulaiman and Mr. Justice Sen.

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March, 12.

MIRZA MAL BHAGWAN DAS (PLAINTIFF) v.

RAMESHAR AND OTHERS (DEFENDANTS).\*

Act No. IX of 1872 (*Indian Contract Act*), section 239—*Hindu law—Partnership entered into with strangers by a member of a joint Hindu family—Liability of other members—Presumption.*

The presumption in the case of a joint Hindu family, where a nucleus is proved, that property standing in the name of a junior member was acquired out of the family funds and belongs to the family cannot be extended to cases of partnership with strangers.

The joint family as a jural unit, or a member in his individual capacity, may enter into an agreement of partnership with persons outside the family. In each of these cases the nature and incidents of the partnership have to be determined by the evidence produced.

There can be no presumption that a business carried on by a coparcener in partnership with strangers is a family business.

Where a business is carried on by one of the members of a joint Hindu family, then until the rest of the members claim the benefits arising therefrom or until the business is in some way adopted as an asset of the joint family, it would be contrary to principle to fasten on the other members any liability for the debts of that business. It must be shown by the creditor who advances such a claim that the business carried on by an individual member has by some such method become the business of the family or is carried on for its benefit.

An agreement, express or implied, is essential for the creation of a partnership, under the Contract Act. A presumption in favour of such an agreement may be raised from the conduct of the parties, from their mutual dealings, and from the surrounding circumstances, but there is no presumption in law that a member of a joint Hindu family entering into a partnership with strangers is doing so in a representative or vicarious capacity. *Parbati Dasi v. Raja Baikuntha*

\* First Appeal No. 180 of 1926, from a decree of Gauri Shankar Tewari, Subordinate Judge of Jaunpur, dated the 4th of January, 1926.



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 MIRZA MAL BHAGWAN DAS v. RAMESHAR. *Nath De* (1), *Bandhu Ram v. Chintaman Singh* (2), *Lala Jagan Lal v. Mathura Prasad* (3), *Punnu v. Kousa* (4) and *Annamalai Chetty v. Subramanian Chetty* (5), distinguished. *Moti Ram v. Muhammad Abdul Jalil* (6) *Mewa Ram v. Ram Gopal* (7), *Gauri Shankar v. Keshab Deo* (8), *Anant Ram v. Channu Lal* (9) and *Kharidar Kapra Co. v. Daya Kishan* (10) referred to. *Gangayya v. Venkataramiah* (11), *Vadilal Lallubhai v. Shah Khushal* (12) and *Baldeodas v. Manekchand* (13), and *Palaniappa Chetty v. Official Assignee of Mardas* (14), followed. *Malaiperumal Chettiar v. Arunachalla Chettiar* (15), *Grey v. Lamond Walker* (16), and *Cox v. Hickman* (17), referred to.

Mr. *Mushtaq Ahmad*, for the appellants.

Mr. *N. P. Singh*, for the respondents.

SEN, J. :—This is a plaintiffs' appeal in a suit for recovery of Rs. 8,078-13-6 for the price of various articles, such as molasses, sugar, raw sugar, sesamum seed, grain etc., supplied to the defendants, together with commission and interest. The plaintiffs carry on the business of commission agency at Shahganj in the district of Jaunpur under the style of *Mirza Mal Bhagwan Das*. The suit was directed against nine defendants, seven of whom were sued as principals and the other two were sued as sureties.

The plaintiffs alleged that defendants Nos. 1 to 4 were members of a joint family and were originally residents of Salimabad in the Kishangarh State in the district of Ajmer; that the defendants Nos. 1 to 4 were related to the other defendants; that defendants Nos. 1 to 4 in partnership with defendants 5, 6 and 7 started a firm known as *Kishori Lal Bhagwati Prasad* at Kishangarh for carrying on trade; that defendant No. 1,

(1) (1913) 12 A. L. J., 79.

(3) (1917) 39 Indian Cases 493.

(5) (1928) 33 C. W. N., 435.

(7) (1926) I. L. R., 43 All., 395.

(9) (1903) I. L. R., 25 All., 378.

(11) (1917) I. L. R., 41 Mad., 454.

(13) (1901) 3 Bom., L. R., 144.

(15) (1917) 41 Indian Cases, 224

(2) (1921) 20 A. L. J., 495.

(4) (1916) 40 Indian Cases, 463.

(6) (1924) I. L. R., 46 All., 509.

(8) [1929] A. L. J., 204.

(10) (1920) I. L. R., 43 All., 116.

(12) (1902) I. L. R., 27 Bom., 157.

(14) (1916) 36 Indian Cases, 787.

(16) (1913) I. L. R., 40 Cal., 523.

(17) (1860) 8 H. L. C., 268.

Roormal, was the managing member of the said partnership concern; that on the recommendation of defendants Nos. 8 and 9, who carried on business in Nasirabad Cantonment under the name of Bhaniram Chhote Lal, and under a letter dated Asarh Badi 9, Sambat 1978, corresponding to 29th of June, 1921, and on their standing sureties thereunder, the plaintiffs supplied various articles to the defendants Nos. 1 to 7; that retrogressive interest at 12 annas per cent. and commission at 8 annas per cent. were settled between the parties; and that upon an account Rs. 6,586-4-3 principal and Rs. 1,452-9-3 as interest were due to the plaintiffs from the defendants.

Roormal and Ram Kishen who were defendants Nos. 1 and 2 admitted the plaintiffs' claim but contended that they had purchased various goods from the plaintiffs on their own responsibility. They denied that defendants Nos. 3, 5, 6, and 7 were partners in the firm styled Kishori Lal Bhagwati Prasad. They also denied that defendants Nos. 8 and 9 ever stood sureties for them or the other defendants and they finally pleaded that Rameshwar, defendant No. 3, who was the own brother of Roormal defendant No. 1 and son of Ram Kishen, defendant No. 2, had been taken in adoption by one Ladu Ram and had nothing to do with the joint family of defendants Nos. 1, 2 and 4. Defendants Nos. 5, 6 and 7 contended that they never carried on any business in partnership with defendants Nos. 1 to 4 nor were they partners in the firm styled Kishori Lal Bhagwati Prasad. They carried on business at Beawar in iron and not in sugar, grain etc.

Defendants Nos. 8 and 9 pleaded that they did not stand sureties for the other defendants in respect of any amount due to the plaintiffs nor did the plaintiffs give any goods on credit to the defendants on the recommendation of these defendants.

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The court below held that the firm styled Kishori Lal Bhagwati Prasad consisted of only four partners, namely, Roormal, defendant No. 1, Ram Kishen, defendant No. 2, Bhagwati Prasad, son of Roormal, defendant No. 4, and Kishori Lal, defendant No. 6, who was outside the family of Ram Kishen; that Rameshwar, defendant No. 3, had been adopted by Ladu Ram and did not belong to the family of Ram Kishen and was not concerned with the partnership firm; that Moti Lal, defendant No. 5, and Bhagwati Prasad, defendant No. 7, were not the members of that firm; and that the defendants Nos. 8 and 9 had not stood sureties for the other defendants. Upon these findings the court below passed a decree against defendants Nos. 1, 2, 4 and 6. These defendants have submitted to the decree and have preferred no appeal.

The plaintiffs in their appeal to this Court claim a decree against Rameshwar, defendant No. 3, Moti Lal, defendant No. 5 and Bhagwati Prasad, defendant No. 7, on the allegation that they are also members of the partnership firm styled Kishori Lal Bhagwati Prasad. They challenge the finding of the lower court that Rameshwar had been adopted by Ladu Ram and that the defendants Nos. 8 and 9 were not sureties for the other defendants.

The onus of proving that Rameshwar had been adopted by Ladu Ram lay heavily upon the defendants. [The judgement discussed the evidence on this point.] The evidence on the record is wholly insufficient to justify the finding that Rameshwar has been transferred to another family by adoption.

An attempt was made by the plaintiffs to fasten the liability upon Moti Lal, defendant No. 5, and Bhagwati Prasad, No. 7, on the allegation that they were also partners in the firm of Kishori Lal Bhagwati Prasad. No deed of partnership has been produced in the case.

There is no evidence that any assets of the joint family to which Kishori Lal, defendant No. 6, belonged had been invested in the partnership firm. No account books have been produced to prove that the joint family shared profits and losses of the partnership firm. The plaintiffs examined two witnesses Baijnath and Sundar Lal in support of the alleged partnership. Baijnath stated that the *khata* in the plaintiffs' account books stands in the names of Kishori Lal, defendant No. 6, and Bhagwati Prasad, defendant No. 4, that none of the other defendants signed the plaintiffs' *bahis*, that the partnership was not entered into in the presence of this witness, that the plaintiffs sent no goods and received no money through defendants Nos. 5 and 7 and that no letters of demand were sent to them. Sundar Lal, the other witness, admits that the partnership was not entered into in his presence. His statement is pure hearsay. These witnesses were rightly rejected by the court below. Upon the evidence on the record it is not proved that the defendants Nos. 5 and 7 were members of the partnership firm.

It is contended by the plaintiffs appellants that Rameshwar being a member of the joint family with Ram Kishen, Roormal and Bhagwati Prasad, and Moti Lal and Bhagwati Prasad being members of another joint family with Kishori Lal, it must be presumed that Rameshwar, Moti Lal and Bhagwati Prasad were also the members of the partnership firm known by the name of Kishori Lal Bhagwati Prasad. A large number of authorities have been cited in support of this proposition. In *Parbati Dasi v. Raja Baikuntha Nath De* (1) the question now raised was not the question in issue. All that was decided in this case was that where property was purchased in the name of a junior member of a joint Hindu family, the criterion was to consider the

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(1) (1913) 12 A. L. J., 79.

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source from which the purchase money was paid, and in the absence of evidence to prove that the junior member had any separate funds the presumption was clear and decisive that the property was acquired by the joint family and was not the self-acquisition of the junior member. In *Bandhu Ram v. Chintaman Singh* (1) the same rule of law was reiterated in different words and a bond held in the name of the managing member of a joint *Mitakshara* Hindu family was presumed to be the joint property of the family in the absence of evidence to the contrary. Their Lordships observed in this case that where the evidence on both sides was somewhat meagre, the presumption in favour of joint ownership was not displaced. *Lala Jagan Lal v. Mathura Prasad* (2) is a decision of the late court of Judicial Commissioners of Oudh and rests upon the same rule. The ordinary presumption of Hindu law is that property acquired, whether in the name of one member of the family or another, while the family is joint, will be deemed to have been acquired from the joint funds, where a joint nucleus was shown to exist, unless it was shown to have been acquired by any member from separate earnings of his own. In *Punnu v. Kousa* (3), a Bench of this Court enunciated the rule in this form:—"We think that if the family was found to be joint and if it was proved that there was joint family property belonging to the family, then the onus of showing that the money advanced on these mortgages was the self-acquired property of Govind would lie upon the defendant, his daughter." This view has not been departed from in *Annamalai Chetty v. Subramanian Chetty* (4).

The contracting capacity of the joint family as a whole or of an individual member of the joint family for himself is not disputed. The joint family as a *jural*

(1) (1921) 20 A. L. J., 495.

(3) (1916) 40 Indian Cases, 463.

(2) (1917) 39 Indian Cases, 493.

(4) (1928) 23 C. W. N., 435.

unit may enter into an agreement of partnership with a person or persons outside the family either through its managing member or by the consensus of the members constituting the joint family. Likewise a member of the joint family may enter into such a contract in his individual capacity. The nature and incidents of the partnership in each of these cases have to be determined by a consideration of the evidence produced in each case. In *Moti Ram v. Muhammad Abdul Jalil* (1), it was held that where a partnership consisted of numerous individuals, some of whom were entered in the partnership deed as holding certain shares on their own behalf and in trust for certain minor members of their family, the partnership would be accountable to such individuals alone and the minor members should not for the purposes of section 4 of the Indian Companies Act be regarded as separate partners. In *Mewa Ram v. Ram Gopal* (2) it was decided that where a person representing a joint Hindu family or a firm lends his name to a partnership contract, he must be deemed to be one person within section 4 of Act VII of 1913. SULAIMAN, J., observed : "If each of the executants entered into the partnership in his own individual capacity, he admittedly counts as one. On the other hand, if he entered into partnership in his representative capacity on behalf of his family, then his joint family must be considered to be a unit and must be deemed to be one person within section 4 of the Indian Companies Act." It follows from this that the matter has got to be determined in each case with reference to the evidence produced therein and that no presumption necessarily arises either as a matter of law or of logic that the other members of the family should be deemed to be partners in the firm by reason of an individual member of the family entering into a contract of partnership with strangers. The same view is en-

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(1) (1924) I. L. R., 43 All., 599. (2) (1926) I. L. R., 48 All., 395.



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dorsed by MUKERJI, J., but in different words: "Where a person lends his name to a partnership contract, he is a 'person' constituting the total number of partners. Behind his back there may be a joint Hindu family or he may be representing a firm consisting of himself and several other members. In either case, so far as the other partners are affected, the party joining in the contract is the only person with whom they are concerned. The share owned by the individual member may have to be, in the case of a partition in the family or dissolution of partnership, divided among certain parties. But that fact cannot affect the other members in the partnership in question. In this view the party joining constitutes only one person and not more than one person." This observation leaves count of the fact that it may be permissible for an individual member of a joint family to enter into a partnership with persons who are strangers to the family on his own personal account and not as a member of the family at all. The matter was considered by this Court in a very recent case in *Gauri Shankar v. Keshab Deo* (1), and it was held that a joint family can enter into a partnership and that where a joint family carries on a trading concern there is no dissolution of partnership amongst the various members of the concern by reason of the death of its managing member.

In the case of a joint family ancestral trade the various members are not only coparceners but also co-partners of the trading firm. A member of the family becomes a co-partner by operation of law and the partnership can suffer no dissolution from the death of an individual member. The law on the subject has been thus stated by Mayne (*Hindu law and Usage*, 9th edition, 398):—"Where a managing member of a joint Hindu family enters into a partnership with a stranger,

(1) [1929] A. L. J., 204.

the other members of the family do not *ipso facto* become partners in the business so as to clothe them with all the rights and obligations of a partner as defined by the Indian Contract Act. In such a case, the family as a unit does not become a partner but only such of its members as, in fact, enter into a contractual relation with the stranger; the partnership will be governed by the Act." The distinction between an ancestral Hindu family firm and a partnership between certain members of a joint family and strangers to that family has been recognized and acted upon in a number of cases. In *Anant Ram v. Channu Lal* (1), this distinction was emphasized in the following terms:—"Now in dealing with this contention it is most essential to bear in mind that the firm Channu Lal, Lalman was not an ancestral Hindu family firm belonging to the members of a joint Hindu family and, as such, subject to the peculiar rules by which such a firm is governed. The relationship between the persons who established this firm was not that created by the personal law and arising out of the status of the members of a Hindu joint family, but that which takes its rise from a contract between partners as defined in section 239 of the Contract Act. The firm was an ordinary commercial trading firm, consisting of several persons who had agreed to combine their property and skill in the business of purchasing and selling cloth at a profit, dividing the profits among themselves in certain proportions. Whatever may be the rules which govern an ancestral joint Hindu family partnership, they cannot, in our opinion, affect a firm such as that which we have before us in this case." In *Khari-dar Kapra Co., Ltd. v. Daya Kishan* (2), a Bench of this Court endorses the view laid down by the Madras High Court in the Full Bench case of *Gangayya v. Venkataramiah* (3). In the latter case the following rule has

(1) (1903) I. L. R., 25 All., 378 (381). (2) (1920) I. L. R., 43 All., 116.

(3) (1917) I. L. R., 41 Mad., 454.

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been enunciated:—"It is well settled that a contract of partnership between a member of a joint family and a stranger does not make every member of the joint family which the managing member represents a partner so as to clothe him with all the rights and obligations of a partner as defined in section 239 of the Indian Contract Act."

In *Vadilal Lallubhai v. Shah Khushal* (1) it was held that "although a person carrying on business is a coparcener in a joint family, it does not necessarily follow that all his coparceners are his partners in that business, entitled with him to its rights and responsible with him for its liabilities. The fact of partnership must be proved by evidence showing that the persons alleged to be partners have agreed to combine their property, labour or skill in the business and to share the profits and losses thereof." The following passage from the judgement may be usefully reproduced:—"In our opinion it is too broad a proposition of law to lay down that because a person carrying on business is a coparcener in a joint family, therefore all his coparceners are his partners in that business, entitled with him to its rights and responsible with him for its liabilities." "We are left to presume them" (surrounding circumstances) "from the mere fact that the plaintiff is joint with his father and his brother; but just as there is no presumption that a loan contracted by a manager of a Hindu family is for a family purpose . . . so there can be no presumption that a business carried on by a coparcener is a family business." The same rule was enunciated in an earlier case by Sir LAWRENCE JENKINS, C. J., in *Baldeodas v. Manekchand* (2). The point argued in this case was that the members of a joint family whose assets comprised a business are *ipso facto* liable for debts that may be incurred by any member

(1) (1902) I. L. R., 27 Bom., 157. (2) (1901) 3 Bom., L. R., 144.

of the family in any business carried on by him. His Lordship observed that this would be a most dangerous doctrine to accept. "Possibly under the rules of Hindu law, which regulate the relations between the members of a joint family, the rest of the members may under certain circumstances claim the benefits arising from a business carried on by one of their number, but until this is done, or until the business is in some way adopted as an asset of the joint family, it would be contrary to principle to fasten on the other members any liability for the debts of that business. Therefore, it must, in my opinion, be shown by the creditor who advances such a claim that the business carried on by an individual member has, by some such method as I have indicated, become the business of the family or is carried on for its benefit." It is respectfully submitted that the above contains the true statement of the law and ought to be adopted. In *Palaniappa Chetty v. Official Assignee of Madras* (1) ABDUR RAHIM, O. C. J., is reported to have made the following observations:—"It is said that there is a general presumption of Hindu law that a business carried on by the head of a Hindu family, although started by himself for the first time, is, without anything more being shown, the joint business of the family. I do not think that there is any such absolute presumption. In order that a presumption may arise it must be shown that the other members by participating in the conduct of the business or its profits or by a long course of acquiescence treated it as a business in which all the coparceners were interested." PHILLIPS, J., did not share his views. He says:—"No doubt the provisions of the Indian Contract Act must be read together with the provisions of the Hindu law, for the coparcenary of a joint Hindu family is of such a nature that it must modify to a certain extent some of the provisions of the Indian

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(1) (1916) 36 Indian Cases, 787.

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Contract Act in regard to partnership, but this is no ground for contending that such provisions are not to be applied, as far as are consistent with Hindu law, to the partnership constituted by a joint family business." He was of opinion that given a joint family with the nucleus of ancestral property, the presumption of Hindu law was that the property acquired by the manager of the family was joint family property. This proposition cannot be controverted. But it is respectfully submitted that the proposition in question cannot be extended to partnerships between a member of the joint family and a stranger. Nor can a presumption be invoked in favour of the creation of such a partnership apart from the provisions of section 239 of the Indian Contract Act. The ruling enunciated in *Malaiperumal Chettiar v. Arunachalla Chettiar* (1) was with reference to the presumption which should ordinarily be raised in the case of a trading caste or family, and it would be most dangerous to extend the rule to a case like the present. An individual member embarking in a business on his own personal account cannot be permitted to involve the entire family's credit and all the joint family properties to the prejudice of the family as a whole including the minor members.

The rule of evidence laid down in *Grey v. Lamond Walker* (2) does not militate against the view that the character and constitution of the partnership in dispute have to be proved in each case upon a consideration of such evidence as may be forthcoming and cannot be decided merely upon a presumption of law one way or the other. There can be no doubt that in the case of trading families there is a presumption of jointness not only of their property but even as regards the business which they carry on.

(1) (1917) 41 Indian Cases, 224.

(2) (1913) I. L. R., 40 Cal., 523.

It was observed by Lord Lindley. (The Law of Partnership, 9th edition, page 25) that where the legislature has provided a statutory definition of partnership, that definition, taken in connection with other sections, must be the ultimate test applicable to the determination of the question whether in any particular case a partnership does or does not exist. Regard has to be paid in particular to the contract and intention of the parties as appearing from the whole facts of the case: *Cox v. Hickman* (1). Section 239 of the Indian Contract Act defines partnership as the relation which subsists between persons who have agreed to combine their property, labour and skill in some business and to share the profits thereof between them. Partnership, therefore, is a relation resulting from the contract, and an agreement, express or implied, is the source of the said relation. The definition in the Indian Contract Act may be compared with the definition given by Watson. According to him it is a voluntary contract between two or more persons for joining together their money, goods, labour and skill or either of them or all of them upon an agreement that the gain or loss shall be divided proportionably between them and having for its object the advancement and protection of a fair and open trade. An agreement to share the loss is not a necessary ingredient of partnership under the Indian Contract Act. An agreement is essential for the creation of partnership under the Indian Contract Act. No evidence is forthcoming in this case that the defendants Nos. 3, 5 and 7 entered into such an agreement with the other persons against whom the decree has been passed by the court below. The agreement to constitute a partnership may be express or may be implied. A presumption in favour of such an agreement may be raised from the conduct of the parties, from their mutual dealings and from the surrounding

(1) (1860) 3 H. L. C., 268.

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circumstances, but there is no presumption in law that a member of a family entering into a partnership with certain persons who are strangers to the family is doing so in a representative or vicarious capacity. If a liability is sought to be fastened upon the other members of the family, it can be done either by evidence of consensus or by evidence to prove an agency through which the contract of partnership was brought into existence. These have not been proved in this case. The finding of the court below that the defendants Nos. 3, 5 and 7 are not the partners in the firm of Kishori Lal Bhagwati Prasad is correct and ought not to be displaced.

It is next contended that defendants Nos. 8 and 9 are the sureties of the remaining defendants and are liable for the plaintiffs' claim. [The judgement discussed this matter and concluded.] I therefore repel this contention. In view of the above findings I would, therefore, dismiss this appeal.

SULAIMAN, J. :—I entirely concur in the conclusions of my learned brother, including the view that there is no presumption in this case that the other members of the family of Kishori Lal are partners in the firm. No doubt it is well settled that where a property stands in the name of a junior member of a joint Hindu family the presumption, where the nucleus is proved, is that it was acquired out of the joint family funds and belongs to the joint family; but that presumption cannot be extended to cases of partnership. The acquisition of property stands on quite a different footing from the membership of a partnership, which involves not only an acquisition of an interest in a partnership concern but an assumption of liability also. My learned brother has referred to the case of *Vadilal Lallubhai v. Shah Khushal* (1), where it was clearly laid down that there was no presumption that a business carried on by a coparcener is a

(1) (1902) I. L. R., 27 Bom., 157.

family business. In *Gangayya v. Venkataramiah* (1),<sup>1929</sup> it was conceded that as between the members of an undivided family and the coparcener who enters into a contract of partnership for the benefit of the family, they will be entitled to call upon him to account for the profits earned by him from the partnership and to share in such profits, but this will not place them in any position of direct contractual relationship with the other partners of the firm, even though the entire assets of the joint family might be available to the creditors of the family in certain circumstances. Similarly in the case of *Baldeodas v. Manekchand* (2), JENKINS, C. J., remarked that under certain circumstances the rest of the members of the family may claim the benefit arising from the business carried on by one of their number, but until this is done, or until the business is in some way adopted as an asset of the joint family, it would be contrary to principle to fasten on the other members any liability for the debts of that business, and, therefore, the creditor who advances such a claim must show that the business carried on by an individual member has by some such method become the business of the family or is carried on for its benefit. It follows, therefore, that the question is one of fact and not of presumption, and there is no initial presumption in favour of the plaintiffs that the entire family of Kishori Lal was a partner of this firm merely because Kishori Lal is now found to have been a partner, particularly when Kishori Lal was a junior member and not the *karta* or the head of the family.

(1) (1917) I. L. R., 41 Mad., 454. (2) (1901) 3 Bom. L. R., 144.

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March, 15.

Before Mr. Justice Sulaiman and Mr. Justice Sen.

LAL CHAND (DEFENDANT) *v.* RAM CHANDAR AND  
OTHERS (PLAINTIFFS).\*

*Act (Local) No. XI of 1922 (Agra Pre-emption Act), sections 4(10), 6 and 11—"Sale"—Sale effected by court under order XXI, rule 34, C.P.C.—Pre-emptible—Failure by defendants to claim right of pre-emption in suit for specific performance of contract of sale—Constructive Res judicata.*

A sale effected by means of a sale deed executed by a court under order XXI, rule 34, Civil Procedure Code, in pursuance of a decree for specific performance of a contract to sell, is a sale within the meaning of section 11 of the Agra Pre-emption Act, so that a suit for pre-emption can lie in respect of it. Such a sale is not one "in execution of a decree" and does not come within the exception to section 6.

Where a suit was brought to pre-empt such a sale, by persons who had been arrayed as defendants in the suit for specific performance which culminated in that sale, the fact that they did not in that suit assert a right of pre-emption was held not to operate by way of constructive *res judicata* to bar their suit for pre-emption, inasmuch as a right of pre-emption can accrue only after the sale has taken place.

Mr. P. L. Banerji, for the appellant.

Messrs. U. S. Bajpai and N. P. Asthana, for the respondents.

SULAIMAN and SEN, JJ.:—This is an appeal by Lal Chand arising out of a suit for pre-emption under very peculiar circumstances. On the 18th of August, 1922, a sale deed was executed by Himmat in favour of Raushan Lal for Rs. 1,400. Suit No. 159 of 1923 was instituted for pre-emption of the property sold, by Ram Chandar and Tej Ram. This suit was dismissed and an appeal by the pre-emptors was preferred to the court of the District Judge. While this matter was pending there was another suit (suit No. 188 of 1923) instituted by Lal Chand for specific performance of a previous

\* Second Appeal No. 672 of 1927, from a decree of Fariduddin Ahmad Khan, Subordinate Judge of Mainpuri, dated the 24th of January, 1927, confirming a decree of Sirajuddin Ahmad, Munsif of Shikohabad, dated the 27th of March, 1926.

contract alleged to have been entered into by Himmat in his favour. Lal Chand impleaded the vendor Himmat, the vendee Raushan Lal, as well as the two pre-emptors Ram Chandar and Tej Ram. This suit for specific performance was decreed. An appeal was preferred by Raushan Lal in the suit, but this was dismissed by the District Judge and so also was an appeal preferred by Ram Chandar and Tej Ram in the pre-emption suit. The position thus was that the suit for pre-emption by Ram Chandar and Tej Ram stood dismissed and the suit for specific performance by Lal Chand stood decreed.

The vendee Raushan Lal declined to obey the decree for specific performance and the court ordered that a sale deed be executed in favour of Lal Chand. This actually took place on the 25th of November, 1925. On this, two new suits for pre-emption, one by Raushan Lal and the other by Ram Chandar and Tej Ram, were instituted against Lal Chand in which Himmat was also impleaded. Both these suits have been decreed by the courts below and Lal Chand has appealed.

The two points urged on behalf of Lal Chand are (1) that no suit for pre-emption lay in respect of the sale deed executed by the court on the 25th of November, 1925, and (2) that the plaintiffs are debarred from now claiming pre-emption when they did not set up this right in the specific performance suit.

The first question to consider is whether the transfer of proprietary interest for consideration which is effected by means of a sale deed executed in pursuance of a decree for specific performance is a sale within the meaning of section 11 of the Agra Pre-emption Act so that a right of pre-emption can accrue in respect of it. Under section 4(10) a sale means a sale as defined in the Transfer of Property Act. We think that the transfer of proprietary interest for a cash consideration, though it was under orders of the court for enforcement of a previous voluntary contract for sale, is a sale within the

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meaning of section 11. It would therefore follow that a right of pre-emption would accrue on such sales. This result is in conformity with the general policy of the Act that property cannot be privately transferred so as to defeat the rights of pre-emption. If a sale outright cannot be affected, the result ought to be the same if a private contract for sale is entered into and then a decree for specific performance allowed to be passed.

The next question to consider is whether the case comes within the exception contained in section 6. If it can be called a sale in execution of a decree of a civil court, then by virtue of that section no right of pre-emption can arise in respect of it. Having considered the language of the section we have come to the conclusion that the exception does not apply to this case. The expression "sale in execution of a decree" is not identical with the execution of a sale deed by the court in pursuance of a decree. There has really been no sale in execution, but the execution of a sale deed because the judgment-debtor Raushan Lal declined to execute it. We therefore think that there is no prohibition against the accrual of the right of pre-emption.

It is quite clear that the right of pre-emption accrues after a sale has taken place. There is no prospective right before such a contingency happens. It is therefore difficult to see how Ram Chandar and Tej Ram or Raushan Lal could be said to have been able to put forward their right of pre-emption in the suit for specific performance. Up to that time the position of Ram Chandar and Tej Ram was merely that of pre-emptors in respect of the earlier sale deed of the 18th of August, 1922. The position of Raushan Lal was undoubtedly that of a vendee. But the sale which is now sought to be pre-empted is of the date 25th of November, 1925, and the right of pre-emption which is now claimed has accrued in respect of it. We therefore fail to see how before the sale deed was executed by the court it could

be said that Ram Chandar and Tej Ram and Raushan Lal were bound to plead that they had a right of pre-emption, in anticipation of any sale deed that might be in future executed under the orders of the court. This being so, it is difficult to hold that the present suit is barred by the principle of *res judicata* on account of the omission on the part of Ram Chandar and Tej Ram and Raushan Lal to set up their right of pre-emption.

Only one appeal has been preferred under section 18 of the Act by Lal Chand and as a result of the consolidation of the suits in the courts below our judgement governs both these cases. The appeal is accordingly dismissed with costs.

#### REVISIONAL CIVIL.

*Before Mr. Justice Kendall.*

SECRETARY OF STATE FOR INDIA IN COUNCIL  
(PETITIONER) *v.* HAR CHARAN DAS (DECREE-HOLDER AND GULZARI LAL (JUDGEMENT-DEBTOR).\*

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March, 16.

Act No. XIX of 1925 (*Provident Funds Act*), sections 2 and 3(1)—*Provident Funds Rules*, rule 10—*Authority of rules—Provident Funds deposit—Attachment after retirement—Civil Procedure Code*, section 60 (k)—*Government of India Act 1919*, section 96B, clause (4).

Money lying to the credit of a retired Government servant in the General Provident Fund is not liable to attachment in execution of a decree against him.

Rule 10 of the General Provident Funds rules is merely a rule of procedure for the Accounts Officer and does not legalize an attachment or authorize the Accounts Officer to comply with a notice of attachment. The rule can have no statutory authority to override the provisions of the Provident Funds Act, 1925, or of section 60(k) of the Civil Procedure Code.

*Veerchand Nowla v. B. B. and C. I. Railway Company* (1), *Hindley v. Joynarain Marwari* (2) and *Secretary of State for India v. Raj Kumar Mukerjee* (3), referred to. *Devi Prasad v. Secretary of State for India in Council* (4) and *Jagannath v. Tara Prasanna* (5), followed.

\* Civil Revision No. 185 of 1928.

(1) (1904) I. L. R., 29 Bom., 259. (2) (1919) I. L. R., 46 Cal., 962.  
(3) (1922) I. L. R., 50 Cal., 947. (4) (1923) I. L. R., 45 All., 554.  
(5) (1923) I. L. R., 3 Pat., 74.

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The Government Advocate (Mr. U. S. Bajpai), for the petitioner.

Messrs. G. L. Agarwala, S. B. Johri and G. S. Ghatak, for the opposite parties.

KENDALL, J. :—This is an application under section 25 of the Small Cause Courts Act for the revision of an order of the Judge of the Small Cause Court of Bareilly, directing the attachment of deposits amounting to Rs. 450 in execution of a decree against one Gulzari Lal. The application however is made on behalf of the Secretary of State.

Gulzari Lal was a clerk in the Collector's office in Pilibhit and he was a subscriber to the General Provident Fund. He has now retired. A decree was obtained against him by one Har Charan Das in the Small Cause Court of Bareilly and it is in the execution of this decree that the present question has arisen. The Judge has complied with the decree-holder's application to attach money lying to the credit of Gulzari Lal in the General Provident Fund, and an objection was made by the Pay and Accounts Officer, United Provinces, that the deposit was not liable to attachment. That objection has, however, been overruled by the court below.

It has been pointed out by the learned Government Advocate that under section 2 of the Provident Funds Act, 1925, a compulsory deposit "is not, until the happening of some specified contingency, repayable on demand otherwise than for the purpose of the payment of premia, etc.", and under section 3(1) of the same Act a compulsory deposit "shall not in any way be capable of being assigned or charged and shall not be liable to attachment under any decree or order of any civil, revenue or criminal court in respect of any debt or liability incurred by the subscriber or depositor." Under clause (k) of section 60 of the Civil Procedure Code, again, "all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act, 1897, for

the time being applies, in so far as they are declared by the said Act not to be liable to attachment" are specifically exempted from attachment.

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Five cases have been cited to support the contention that the compulsory deposit is not liable to attachment. In the cases of *Veerchand Nowla v. B. B. and C. I. Railway Company* (1), *Hindley v. Joynarain Marwari* (2) and *Secretary of State for India v. Raj Kumar Mukherjee* (3), the attachment was disallowed. These three cases have been distinguished from the present one by the Judge of the court below on the ground that the provident fund concerned was a Railway Provident Fund and was not the General Provident Fund. It is argued here on behalf of the decree-holder that there is a special rule of the General Provident Fund which renders a compulsory deposit in that Fund liable to attachment. But it may be said here that these three decisions are by no means without value in the present case, for they show that the sanctity attached by the Act to compulsory deposits as defined in the Act does not cease with the retirement of the contributor, or even at his death. The decisions relate to the period previous to 1925, which is the year of the current Act. But this is not a matter of any importance, as there has been no change in the Act of 1925 which affects any of the considerations in the present case.

Of the two other decisions that have been referred to in argument the lower court has mentioned the case of *Devi Prasad v. Secretary of State for India in Council* (4), but has refused to follow it on the ground that there is nothing in the published report to show whether the deposits concerned in that case were governed by the General Provident Fund rules or by some other rules. I have sent for the paper book in the case and find that the contributor concerned was a clerk in the

(1) (1904) I. L. R., 29 Bom., 259.

(2) (1919) I. L. R., 46 Cal., 962.

(3) (1922) I. L. R., 50 Cal., 347.

(4) (1923) I. L. R., 45 All., 554.

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Accountant General's office and that he had been a subscriber to the General Provident Fund. If this fact had been known to the Judge he would have been bound to follow that decision. The Patna case of *Jagannath v. Tara Prasanna* (1) undoubtedly refers to a contributor to the General Provident Fund. It was suggested by Mr. *Girdhari Lal Agarwala* on behalf of the decree-holder that it may have been a case in which the contributor was still in service. From the fact, however, that the judgement mentions that the contributor *was* a nazir in the civil court, and that rule 10 of the rules regulating the General Provident Fund was discussed and criticised, it is apparent that the contributor had retired, for rule 10 relates to "withdrawals on retirement".

This brings me to rule 10 on which the decree-holder's whole case is based. That rule is to the following effect:—

"The amount which accumulates to the credit of a subscriber in permanent employ shall, when he quits the service, become his property and shall be handed over to him unless the Accounts Officer has received notice of an attachment, assignment or encumbrance affecting the disposal of the amount or any portion of it. Should such notice have been received the Accounts Officer shall hand over to the subscriber only that portion of the amount which is not affected by the attachment, assignment or encumbrance and shall obtain the orders of the Government of India in the Finance Department as administrators of the Fund regarding the disposal of the balance."

It is argued that this rule legalises the attachment of the amount which accumulates in the General Provident Fund, in spite of the fact that under section 3 of the Act compulsory deposits are protected, in spite of clause (k) of section 60 of the Civil Procedure Code, and in spite of the decisions of the Courts which have been

(1) (1923) I. L. R., 3 Pat., 74.

already quoted to show that this protection extends to the period after the retirement of the contributor and even after his death.

The effect of the rule is not altogether clear. The argument is that according to it the compulsory deposit becomes automatically the property of the contributor on his retirement and that it is payable on demand. The rule, however, provides that the Accounts Officer shall not hand it over if notice has been received of attachment, assignment or encumbrance until the orders of the administrators of the Fund have been received. Clearly then the deposit does not become absolutely the property of the contributor on his retirement, nor is there any express provision by which the deposit is rendered liable to attachment. The utmost that can be said for the decree-holder is that the rule does contemplate that a notice of attachment may be received, and that it may be possible to infer from this that such a notice would be a legal notice. The lower court has requested the Pay and Accounts Officer to "comply with rule 10 of the General Provident Fund rules and send the amount of deposits, Rs. 450, here." But the rule does not authorize the Accounts Officer to comply with a notice of attachment or to send the amount to the attaching court, but merely to obtain the orders of the administrators of the Fund. The rule in short appears to be merely a rule of procedure directing the Accounts Officer how to proceed on receipt of a notice of attachment. It does not by its terms legalize a notice of attachment. Even if the express intention of the rule was to legalize an attachment, it is certainly not clear to me that the framers of the rule had any authority to override the provisions of the Act. Presumably the rules are framed by the Government of India, but it does not appear to me that they have statutory authority. It has been argued that statutory authority to these rules

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has been given by sub-section (4) of section 96B of the Government of India Act. That sub-section confirms "all rules or other provisions in operation at the time of the passing of the Government of India Act, 1919, whether made by the Secretary of State in Council or by any other authority relating to the Civil service of the Crown in India." But it is certainly open to question whether this expression is sufficiently wide to cover rules regulating the General Provident Fund. I am decidedly of opinion that it is not, but it is not necessary for me to decide the point here because, as I have already said, the rule itself does not appear to me expressly to authorize the attachment of these compulsory deposits or to revoke any statutory provision relating to them.

I consider, therefore, I am justified in following the authority of the cases of *Devi Prasad v. Secretary of State for India in Council* (1) and *Jagannath v. Tara Prasanna* (2) and holding that the deposit in question is not liable to attachment. I therefore allow the application with costs and set aside the order of the court below directing the deposits to be attached.

### APPELLATE CIVIL.

*Before Mr. Justice Banerji and Mr. Justice King.*

March, 18. EJAZ AHMAD AND OTHERS (DEFENDANTS) *v.* SAGHIR BANO AND OTHERS (PLAINTIFFS) AND AKBARI BEGAM AND OTHERS (DEFENDANTS).\*

*Civil Procedure Code, section 11—Partition suit—Res judicata as between co-defendants—Conflict of interest inter se unnecessary.*

In a partition suit, if, for the purpose of giving relief to the plaintiff, a question has to be decided as between the different parties whether they are arrayed as plaintiffs or defendants,

\* Second Appeal No. 1243 of 1926, from a decree of P. C. Plowden, District Judge of Bareilly, dated the 29th of April, 1926, confirming a decree of Lakshmi Narain Misra, Munsif of Haveli, dated the 21st of September, 1925.

(1) (1923) I. L. R., 45 All., 554. (2) (1923) I. L. R., 3 Pat., 74.



the decision is binding on all the parties, so as to be *res judicata* as between any co-defendants although there was no conflict of interest in the suit as between those defendants. *Parsotam Rao Tantia v. Radha Bai* (1), followed. *Nalini Kanta Lahiri v. Sarnamoyi Debya* (2), referred to. *Muhammad Ahmad v. Zahur Ahmad* (3) and *Gangaram Balkrishna v. Vasudeo Dattatraya* (4), distinguished.

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Mr. Syed Mohammad Husain, for the appellants.

Dr. Kailas Nath Katju, for the respondents.

BANERJI and KING, JJ. :—The four appellants were defendants in a suit for partition. The property in which the plaintiffs claim a share belonged to one Hafiz Niaz Ahmad. He left behind several heirs and the plaintiffs claim specified shares against the other heirs of Niaz Ahmad. The defence of the appellants and the other defendants was that the house in question was given to Musammât Wilaiti Begam by Hafiz Niaz Ahmad in lieu of her dower debt and the plaintiffs have no right to the house, and in no case can they have their share apportioned without payment of the proportionate share of the debt. The defendants averred that Musammât Wilaiti Begam's dower was Rs. 40,000, but the plaintiffs say that it was Rs. 1,000.

In the year 1910 one of the heirs of Niaz Ahmad transferred his share and the transferee instituted a suit for partition of that share. In that case some heirs supported the claim of the transferee but the present plaintiffs and the appellants pleaded that Musammât Wilaiti Begam's dower was Rs. 40,000 and that she was in sole possession of her husband's assets in lieu of dower debt. The issue then raised was whether Wilaiti Begam's dower was settled at Rs. 40,000, whether the dower was still due to her, and whether she was in sole possession of her husband's assets in lieu of the dower debt.

(1) (1910) I. L. R., 32 All., 469.

(2) (1914) 19 C. W. N., 531.

(3) (1922) I. L. R., 44 All., 334.

(4) (1922) I. L. R., 47 Bom., 534



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In the present case the same issue arises and the question that we have to decide in this appeal is whether the judgement and the decree that followed the 1910 suit bind the parties with regard to the issue just set out by us.

The courts below have held that the finding in the previous litigation was binding, although the plaintiffs and the appellants were co-defendants in the case.

It is unnecessary to go into the reasons given by the learned District Judge in appeal, but in our opinion the question is concluded by what was held in the case of *Parsotam Rao Tantia v. Radha Bai* (1). The decree passed in a partition suit, in which for the purpose of giving relief to the plaintiff, if a question has to be decided as between the different parties whether they are arrayed as plaintiff or defendant, must in our opinion be binding on all the parties. No doubt in an ordinary case a finding on an issue as between co-defendants is not binding unless it is necessary to give relief to the plaintiff and if there is a conflict between the defendants, but the decree in a partition suit stands on a different footing. In the case of *Parsotam Rao Tantia v. Radha Bai* it was distinctly pointed out that there was no conflict in interest between the two defendants who had in the previous suit resisted the claim of the plaintiffs. In the present case no doubt there was no conflict between the appellants and the plaintiffs, but for the purpose of giving relief to the plaintiffs it was absolutely necessary to decide the issue regarding the dower of Wilaiti Begam and regarding the question of the possession of the assets of her husband. The principle of that case has been recognized in various other cases and reference may be made to the judgement of their Lordships of the Privy Council in the case of *Nalini Kanta Lahiri v. Sarnamoyi Debya* (2), where it was held that in a partition suit where the in-

(1) (1910) I. L. R., 32 All., 469. (2) (1914) 19 C. W. N., 531.

terests of different parties had to be ascertained, the decree passed in the case cannot be ignored by a party afterwards in a suit that he may institute in spite of the previous ascertainment of shares.

The learned advocate for the appellant has strenuously contended before us that the case of *Muhammad Ahmad v. Zahur Ahmad* (1), and the case of *Gangaram Balkrishna v. Vasudeo Dattatraya* (2), lay down that there can be no *res judicata* where there was no conflict between the defendants *inter se*. On an examination of the two cases it is clear that there the issue in the second case was not identical with the issue that had to be decided in the previous case to give relief to the plaintiff. We are therefore of opinion that there is no force in this appeal and we dismiss it with costs.

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### FULL BENCH.

Before Mr. Justice Sulaiman, Mr. Justice Mukerji and  
Mr. Justice Banerji.

SAHDEO (PLAINTIFF) v. BUDHAI AND OTHERS (DEFENDANTS).\*

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Act (Local) No. III of 1926 (Agra Tenancy Act), sections 99, 121 and 230—Suit between co-tenants for declaration and joint possession—Jurisdiction—Civil and Revenue courts.

A suit for a declaration that the plaintiff, jointly with the defendants, is a co-tenant of a certain holding, and for joint possession thereof, is cognizable by the revenue court and not by the civil court.

So far as the suit is one for the declaration claimed, it falls within section 121 of the Agra Tenancy Act, 1926, inasmuch as the defendants, who are admittedly tenants, are persons claiming to hold through the landholder. Regarding the relief for possession the suit falls within the scope of section 99, for the same reason. It is not necessary, for the

\* Miscellaneous Case No. 1112 of 1928.

(1) (1922) I. L. R., 44 All., 334. (2) (1922) I. L. R., 47 Bom., 534.

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purpose of those sections, that the defendants must set up a case of a special grant by or special contract with the landholder, or a subsequent recognition by him of their title, coupled with a denial of the plaintiff's title.

A suit falling under section 99, and a suit falling under section 121, being specified in the fourth schedule of the Act, section 230 bars the cognizance of the present suit by the civil court.

*Ram Partab v. Chhotey Lal* (1), followed.

THIS was a reference by the Munsif of Allahabad under section 267 of the Agra Tenancy Act, III of 1926. It was first heard by a Bench of two Judges, who referred it to a larger Bench. The facts are fully set forth in the referring order, which was as follows :—

SEN and NIAMAT-ULLAH, JJ. :—This is a reference by the learned Munsif of Allahabad under section 267 of the Agra Tenancy Act (Act III of 1926).

The facts of this case have been set out in detail in the order of reference. The property in dispute is an occupancy holding which at one time was in the occupation of Daulat, Sheo Sahai, Ram Sahai, Jamna, Sheo Ambar, Kalu and Pancham. Upon the death of Pancham the holding vested in the remaining six persons. The defendants Nos. 1 and 2 are alleged to be the heirs of Ram Sahai and Sheo Sahai, and defendant No. 3 as that of Jamna and Kalu. The plaintiff, claiming to be the son of Daulat, sued in the civil court for a declaration that he was the tenant of the holding jointly with the defendants Nos. 1 to 3. In the alternative he prayed for joint possession. The defendants denied the plaintiff's title and contended that the holding belonged exclusively to the defendants Nos. 1 to 3 through their ancestors and that the plaintiff was not entitled to the declaration asked for.

The suit had originally been instituted in the court of revenue, and upon a question of jurisdiction being raised, the plaint was returned for presentation to the proper court. This led to the institution of the present suit in the court of the Munsif of Allahabad.

The learned Munsif is of opinion that the suit as brought is within the exclusive jurisdiction of the court of revenue.

(1) (1928) 26 A. L. J., 481.

He relies upon section 121 of the Tenancy Act, which provides that any tenant may bring a suit for declaration of his rights as a tenant as against the landlord or any person claiming through him. There can be no doubt that the defendants denied the title of the plaintiff as a tenant and set up an exclusive title in themselves. The learned Munsif is of opinion that where a person claims to be the sole tenant of a holding he must be deemed to be claiming through the landlord, and reliance has been placed upon a decision of this Court in *Ram Partab v. Chhotey Lal* (1). This decision supports the view of the learned Munsif and contains the following pronouncement:—

“It is provided by section 99 of the Agra Tenancy Act that any tenant . . . . ejected from or prevented from obtaining possession of his holding or any part thereof otherwise than in accordance with the provisions of this Act by . . . . any person claiming through . . . . landholder . . . whether as tenant or otherwise, may sue the person so ejecting him or keeping him out of possession for possession of the holding. In the present case it is clear from the allegations contained in the plaint that the plaintiff's case was that the defendant was keeping him out of possession of his share in the plot in dispute, and in so doing was setting up a right of tenancy in himself. There can be no room for doubt that by asserting sole title in himself as a tenant to the plot in dispute the defendant claimed through the landholder. In other words the defendant maintained that he was the sole tenant of the plot in dispute on behalf of the landholder. In view of these allegations contained in the plaint there is no escape from the position that the case came within the purview of section 99(1) (b) of the Agra Tenancy Act and was cognizable by the revenue court. As stated above, the plaintiff asked not only for a decree for joint possession, but also claimed a declaration of his right as a tenant of a portion of the area of the plot in dispute. A suit for a declaration of that nature filed by the plaintiff comes within the purview of section 121(1) of the Tenancy Act, and the jurisdiction of the civil court to try such a suit is barred. It is clear that the plaintiff's case was that the defendant in setting up a right in himself as the sole tenant of the plot in dispute was claiming to be a tenant

(1) (1928) 26 A. L. J., 491.

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on behalf of the landholder, and therefore, he was a person claiming to hold 'through the landholder.' ''.

A suit under section 99 or section 121 of the Tenancy Act is exclusively cognizable by the court of revenue. The question which calls for determination is whether the suit now instituted in the civil court comes within the purview of one or other of the aforesaid sections. This would depend upon the frame of the suit, the nature of the relief and in particular upon the status of the defendant or defendants, having regard to the pleadings.

The defendants deny the title of the plaintiff and claim an exclusive title to the holding. The plaintiff does not impugn the title of the landlord and his title is not directly or indirectly in issue. Indeed, there is no question of proprietary title involved in the case between the plaintiff on the one side and the landlord or a person claiming through him or on his behalf on the other side. The pleadings in the suit are clear and decisive. It is necessary for the proper determination of the question of jurisdiction that the parties should be held fast to their pleadings. A defendant may be said to claim through the landlord where his claim is urged either on the basis of a grant from the landlord or of a special contract as a lease by the landlord to him. It is doubtful whether in the absence of a grant or a special contract the mere recognition of the title of the defendant by the landlord, coupled with a denial of the plaintiff's title, would fulfil the requirements of section 99 or 121. In the present case no grant or special contract has been pleaded, nor has it been suggested that the pretensions of the defendants are favoured by the landlord or are supported by the might of his authority. The pleadings, therefore, are not helpful to the defendants in ousting the jurisdiction of the civil court, which in the absence of a statute to the contrary is the only court competent to try a declaratory suit between rival tenants. The determination of their rights depends in a large measure upon the application of section 24 of the Tenancy Act. The title of either party is based upon statute. The question of statutory succession is independent of the volition of the landholder and does not rest upon grant, special contract or recognition of the landholder. It has, however, been ruled in 26 A. L. J., 431 that in a suit by rival tenants where the defendant asserts an exclusive title in himself, *he must be deemed to claim*

*through or on behalf of the landlord.* We find it extremely difficult to subscribe to this broad proposition. In our view, a case like the present has not been provided for in sections 99 and 121. There is nothing in the language of either of these two sections to suggest that a presumption arises that the defendant must be deemed to be claiming through the landlord. We are not aware of any rule of evidence outside sections 99 and 121 to warrant such a presumption. With great respect, we beg leave to differ from this view.

The point raised in this case is one of general importance and is likely to arise frequently in civil and revenue courts. It is desirable that the matter should be considered by a larger Bench for decision. Let the papers be laid before the Hon'ble the CHIEF JUSTICE for constituting a larger Bench for the disposal of the reference.

The case was accordingly laid before a Bench of three Judges.

The plaintiff was not represented.

Mr. *Shiva Prasad Sinha*, for the defendants.

SULAIMAN, J.:—This is a reference under section 267 of the Agra Tenancy Act, made by the Additional Munsif of Allahabad as he was in doubt as to his having jurisdiction to entertain this suit. His reference is in accord with a ruling of this Court, *Ram Partab v. Chhotey Lal* (1). The reference came up first before another Bench which felt doubtful as to the correctness of that ruling. The matter has accordingly been referred to a larger Bench.

The plaintiff first instituted a suit for declaration of his right to a tenancy in the revenue court, but his plaint was returned for presentation to the proper court on the ground that the revenue court had no jurisdiction to entertain the suit. He has now filed the suit in the civil court and an objection has this time been raised by the defendants that the civil court had no jurisdiction to hear the case. It is not necessary to set forth all the allegations in the plaint, but it would be sufficient to

(1) (1928) 26 A. L. J., 481.

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state that the plaintiff claimed that his father Daulat was a tenant jointly with the defendants Nos. 1, 2 and 3 and that on the death of his father the plaintiff has succeeded to the joint tenancy. He claimed (a) a declaration to the effect that the plaintiff jointly with defendants Nos. 1 to 3 is a tenant of the holding specified in the plaint and that defendant No. 4 has no right or share in it, and (b) if for any reason the plaintiff is deemed to have been dispossessed, he may be awarded possession over the same jointly with the defendants Nos. 1 to 3. The dispute is undoubtedly with regard to the tenancy and the claim of the plaintiff is contested by the defendants.

No doubt, under the old Tenancy Act it used to be held by this High Court that a dispute between rival claimants to a tenancy is cognizable by the civil court, particularly when the landholder is not a party to the proceeding. The Board of Revenue had expressed a contrary opinion.

The present case, however, is governed by the new Tenancy Act (Act No. III of 1926) and the old rulings are not necessarily applicable.

It is clear that the legislature has made drastic changes in the tenancy law and the language of the relevant sections has been considerably altered so as to widen their scope very much. Under section 99 of the Act a tenant who has been ejected or prevented from obtaining possession of any part of his holding otherwise than in accordance with the provisions of this Act by his landholder or any person claiming as landholder to have a right to eject him, or any person claiming through such landholder or person, whether as tenant or otherwise, may sue the person so ejecting him or keeping him out of possession for possession and compensation. Section 121 provides that at any time during the continuance of a tenancy the tenant of a holding may sue the



landholder, or any person claiming to hold through the landholder, whether as tenant or rent-free grantee or otherwise, for a declaration of his right as tenant, and that in any such suit against a person claiming to hold through the landholder, the landholder should be joined as a party. These sections correspond to the old sections 79 and 95. Section 230, which has not been referred to in the order of reference or in the rulings cited in the judgment, corresponds to the old section 167 and provides in emphatic language that all suits and applications of the nature specified in the fourth schedule shall be heard and determined by the revenue courts, and no courts other than the revenue courts shall, except by way of appeal or revision as provided in this Act, take cognizance of any such suit or application, or of any suit or application based on a cause of action in respect of which adequate relief could be obtained by means of any such suit or application. This section is very wide and mandatory. So long as a suit or application of the nature specified in the fourth schedule can be heard by the revenue court the jurisdiction of the civil court is completely ousted. The question which we have to answer is whether the present suit is of a nature specified in that schedule. It seems to me quite clear that the relief for declaration claimed by the plaintiff would fall within the four corners of section 121 of the Act inasmuch as the defendants, although they had not claimed to be the landholder, admittedly claimed to be tenants and therefore must be deemed to be persons claiming through the landholder. The relief for possession falls within the scope of section 99 because here again the defendants are admittedly persons "claiming through such landholder or person, whether as tenant or otherwise." It does not seem necessary that the defendants must set up a case of a special grant or special contract with the landholder or a subsequent recognition by him of their

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title, coupled with a denial of the plaintiff's title. To place this restriction on the expression used in this section would be to limit the scope of the provisions by introducing new words into the section. In Group B of the fourth schedule, serial Nos. 12 and 15 include suits under sections 99 and 121 of the Act and therefore make section 230 directly applicable.

The Explanation to section 230 makes it still more clear that the revenue court alone would have jurisdiction to entertain this suit when adequate relief could be granted by the revenue court, it being immaterial whether the relief asked for is or is not identical with that which the revenue court could have granted. I may further point out that a declaration granted in favour of a tenant in the absence of the landholder may lead to further litigation and need not be absolutely final and conclusive. On the other hand, if the suit is instituted in the revenue court and the landholder is made a party under the provisions of section 121, sub-clause (2), the dispute may be settled once for all. In this view of the matter I would hold that this suit is not cognizable by the civil court and that the plaint ought to be returned for presentation to the revenue court. This is my answer to the reference.

MUKERJI, J. :—I entirely agree with my brother SULAIMAN's remarks, but having regard to the importance of the question I would like to add just a few words of my own.

There can be no doubt that if section 230 of the Tenancy Act of 1926 excludes the suit before us from the cognizance of the civil court, the civil court will have no right to hear it on the simple ground that all cases of a civil nature should be heard by it. In order to see whether the case falls or not within the purview of section 230 of the Tenancy Act, we have to look to schedule

4 and serial Nos. 12 and 15. These numbers refer to sections 99 and 121 of the Tenancy Act.

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As already stated by my brother, SULAIMAN, J., the suit is partly one for a declaration of title that the plaintiff is a co-tenant of a certain holding with the defendants. The plaintiff further wants that in case it should be proved that he is out of possession, he should be put in joint possession with the defendants. So far as his suit is one for declaration of title, we have to see if it is covered by section 121 of the Tenancy Act. That section reads as follows:—

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“(1) At any time during the continuance of a tenancy the tenant of a holding may sue the landholder, or any person claiming to hold through the landholder, whether as tenant or rent-free grantee or otherwise, for a declaration of his right as tenant.

(2) In any such suit against the landholder any person claiming to hold through the landholder may be joined as a party, and in any such suit against a person claiming to hold through the landholder, the landholder shall be joined as a party.”

It will be noticed that the suit may lie not only against the landholder but also against “any person claiming to hold through such landholder, whether as a tenant or . . .” The question then is whether the defendants, who are interested in denying the plaintiff’s title, are or are not persons who are claiming through the landholder. In my opinion, when a person is admitted to be the tenant of a holding it must be taken that he is claiming through the landholder. He cannot claim otherwise than through the landholder. It is not necessary, therefore, that before the suit is instituted under section 121 the defendant should have declared anywhere, either orally or in writing, that he was claiming through the landholder. The words “through the landholder”

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were put down because the classes of suits contemplated might include a suit which was directed not only against a tenant but also against people other than tenants. Those people would come under the words "rent-free grantee or otherwise". The learned Judges who found difficulty in applying section 121 of the Tenancy Act were of opinion that the words, "claiming to hold through the landholder", implied a previous declaration of the character of the holding by the defendant. I respectfully differ from that opinion.

So far as the suit relates to possession or joint possession, almost the same remarks apply if we read section 99 in the same light. The relevant portion of section 99 reads as follows:—"A tenant . . . prevented from obtaining possession of his holding . . . (a) by his landholder . . . or (b) any person claiming through such landholder . . . whether as a tenant or otherwise, may sue the person . . . keeping him out of possession."

Now let us see whether the case before us falls or not entirely within the purview of this language. The persons who are interested in keeping the plaintiff out of possession are admittedly tenants. Being tenants, they are claiming not through any title held in themselves, but through a title held by the landholder. There seems therefore to be no escape from the language of section 99 of the Act.

As my brother has already pointed out, the amended section relied on settled a great anomaly that existed under the Act of 1901, as interpreted by this Court. A suit by a person who was admitted to be a tenant always lay in the civil court. The successful plaintiff, after going through litigation in three courts, still found himself confronted with a difficulty if the landholder was not inclined to accept him as a tenant. He had again to go through a campaign of litigation. To settle this anomaly, the language of sections 99 and

121 have been, very wisely, widely put, so that, once for all, the question of title might be settled to the satisfaction of the tenants and the landlord. That this idea was in the mind of the legislature is made perfectly clear by sub-section (2) of section 121. It enjoins on the plaintiff the duty of making the landholder a party where the suit is against any person other than the landholder. The idea is that the landholder must be there, so that the question may be settled once for all in his presence.

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I agree in answering the reference in the manner proposed by my brother SULAIMAN, J.

BANERJI, J. :—I agree with the view taken by my learned brothers. I only wish to add that for the purpose of deciding whether a revenue court or a civil court has jurisdiction to try a suit, one has got to refer to section 230 of the Agra Tenancy Act. The intention of the legislature appears to be perfectly clear, as in section 230 it is provided that no court other than a revenue court shall take cognizance of any suit based on a cause of action in respect of which adequate relief could be obtained by means of any suit or application. A reference to schedule 4, Group B, serial Nos. 12 and 15 makes it clear that the revenue court could grant the relief which the plaintiff seeks by the present suit. The cause of action alleged by him is of such a nature that no question can arise as to the jurisdiction of a revenue court granting the relief the plaintiff asks for. I agree with my learned brothers that sections 99 and 121 of the Agra Tenancy Act are wide enough to provide for the relief claimed by the plaintiff.

BY THE COURT :—The present suit is not cognizable by the civil court. We accordingly order that the court of the Additional Munsif of Allahabad should return the plaint for presentation to the revenue court. As the defendants have been inconsistently raising the question of jurisdiction in the two courts, we direct that both parties should bear their own costs throughout.

## APPELLATE CRIMINAL.

1929  
September,  
10.

*Before Mr. Justice Young and Mr. Justice Sen.*

EMPEROR *v.* NARBADA PRASAD AND ANOTHER.\*

*Act No. I of 1872 (Evidence Act), sections 34 and 67—Account-books—"Regularly kept in the course of business"—Formal proof of regularity unnecessary—Act (Local) No. X of 1922 (U. P. District Boards Act), section 34—False defence of accused alleging criminal conspiracy to bring false charge against him—Aggravation meriting severer sentence.*

Account-books are admissible in evidence, under section 34 of the Evidence Act, 1872, without any formal proof that they were regularly kept in the course of business. The legislature, in section 34, has dispensed with the necessity of such formal proof, which was required by the former Act II of 1855.

In order that account-books may be deemed regularly kept in the course of business it is not necessary to show that they had been entered up as and when the transactions took place.

It is a matter of intrinsic evidence as to whether the books in question are books of account and regularly kept in the course of business.

Where it is not alleged that an account-book has been wholly or partly written by any particular person, section 67 of the Evidence Act does not apply.

False allegations against innocent and respectable persons of a criminal conspiracy to bring a false charge against the accused, when used as a defence, aggravates greatly the original offence, and the fact ought to be taken into consideration in awarding punishment.

The Government Advocate (Mr. U. S. Bajpai), for the Crown.

Dr. K. N. Katju and Messrs. A. P. Pandey and Gaya Prasad, for the respondents.

\* Criminal Appeal No. 304 of 1929, by the Local Government, from an order of S. W. Bobb, Magistrate First Class, Allahabad, dated the 28th of January, 1929.

YOUNG and SEN, JJ.:—Pandit Narbada Prasad and Jagannath Prasad *alias* Kunnoo were charged before Mr. S. W. Bobb, first class Magistrate of Allahabad, under section 168 of the Indian Penal Code, and sections 168/109 of the Indian Penal Code, for contravention of section 34 of the District Boards Act of 1922. The Magistrate acquitted both the accused.

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Section 34 of the District Boards Act reads as follows:—“(1) A member of the Board who, otherwise than with the permission in writing of the Commissioner, knowingly acquires, or continues to have, directly or indirectly by himself or his partner, any share or interest in any contract or employment with, by or on behalf of the Board, shall be deemed to have committed an offence under section 168 of the Indian Penal Code.”

An “interest in a contract” we hold to mean a financial interest, with profit or hope of profit from the contract as the object of the person interested. This must be inferred from the facts in evidence in each case.

In the month of January, 1928, the District Board of Banda was suspended by order of the Government. It appears to us, after reading of the activities of this Board in this case, that the Banda District Board might have been suspended earlier with great advantage to the citizens of Banda. The administration of the District Board was placed in the hands of the District Magistrate, who appointed Mr. Chakarvarti as Official Chairman of the Board. Mr. Chakarvarti, on investigation into the affairs of the District Board, thought it proper to request Rai Bahadur Thakur Jaswant Singh, a Special Magistrate of Banda, to investigate the connection of Narbada Prasad, who had been Chairman of the Mau sub-committee of the District Board, with a contract for metalling one mile of a road in the Mau sub-division which had been given to the second accused,

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Jagannath Prasad. It is to be noted that the investigation was started officially and not at the instigation of Thakur Jaswant Singh. On the 24th of March, 1928, Thakur Jaswant Singh had finished his investigation and made his report in this matter to Mr. Chakarvarti. The police then took the matter in hand, and as a result the Local Government sanctioned the prosecution of Narbada Prasad on the 7th of July, 1928. In view of the nature of the defence in this case, to which we will allude hereafter, these dates are important. Mr. Vishnu Sahai, a first class Magistrate of Allahabad, originally commenced the hearing, but, on an application for transfer being made to the High Court, the case was ordered to be transferred to Mr. S. W. Bobb.

The evidence produced by the prosecution consisted of :—

[The judgement then proceeded to set forth the evidence in detail, which included certain documentary evidence, and continued.]

And, lastly, the very important documentary evidence which was discovered in the search of the houses of Narbada Prasad and Jagannath. These documents consisted of muster rolls, in which names of the labourers on the contract appear, with the amounts which were paid to them, a cash-book consisting of entries from the 18th of February, 1927, down to the 17th of July, 1927, setting out the payments made by Narbada Prasad for the purposes of the contract . . . This cash-book is of most vital importance and, in our view, it is impossible for any one having this evidence before him to come to any other conclusion but that Narbada Prasad was interested in the contract within the meaning of section 34 of the District Boards Act. There was also a ledger account, which extracted from the cash-book all the payments made by Narbada Prasad from



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February to July, amounting in all to Rs. 2,960-12-6, on account of this contract. (The contract price to be paid to Jagannath was Rs. 4,995.) The cash-book, ledger, and muster roll were discovered at Jagannath's house. Jagannath admits that the writings in *Muria* and the cash-book and ledger are his.

[The judgement then commented on the conduct of the Board and discussed the oral evidence in detail.]

We are satisfied that the oral evidence alone is sufficient to bring home the charge to the accused.

With regard to the documentary evidence a preliminary objection has been taken by Dr. *Katju* that the account-books, Exhibits G 18 and G 20, are not admissible in evidence for want of formal proof. It cannot be questioned that the Crown is entitled to rely upon any material evidence of an incriminatory character found in the house of an accused person as the result of house search. If Exhibits G 18 and G 20 directly or indirectly connect Jagannath Prasad with the offence charged, the fact that those documents were found in the house of Jagannath is itself a circumstance which, if unexplained, may seriously tell against Jagannath Prasad. It has not been suggested in the case that any entries in these documents have been interpolated or fabricated.

Section 43 of Act II of 1855 provided that "Books proved to have been regularly kept in the course of business shall be admissible as corroborative but not as independent proof of the facts stated therein." Act II of 1855 was repealed and was replaced by the Indian Evidence Act (Act I of 1872). Section 34 of this Act runs as follows:—"Entries in books of account, regularly kept in the course of business, are relevant whenever they refer to a matter into which the court has to inquire, but such statements shall not alone be sufficient to charge any person with liability." From a com-



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parison of the two sections referred to above, it is manifest that there is a material difference between the two and the change of expression in the later Act is not a mere variant but amounts to a substantial alteration in the law. Under the former Act, books to be admissible had to be "*proved to have been regularly kept in the course of business*". In the latter Act the words "*proved to have been*" have dropped out. The legislature dispensed with the necessity of any formal proof that the books were kept up in the regular course of business. It was a matter of intrinsic evidence as to whether the books in question were books of account and regularly kept in the course of business. It was held by Mr. Justice WEST in *Munchershaw Bezonji v. New Dhurumsey Spinning etc Co.* (1), that only such books as are entered up as transactions take place that can be considered as books regularly kept in the course of business within the meaning of section 34 of the Indian Evidence Act. Their Lordships of the Privy Council did not approve of this ruling and held that it gave a much too limited meaning to the section: *Deputy Commissioner of Bara Banki v. Ram Parshad* (2).

The only limitation imposed by the statute is that the statement contained in the account-books "*shall not alone be sufficient to charge any one with liability.*" If the entries stood alone, without any independent evidence such as has been produced in this case, the entries could not be treated as sufficient evidence to convict either Jagannath Prasad or Narbada Prasad.

Whether or not the books have been regularly kept in the course of business is a question of fact and this question may be solved by a reference to the entries in the books. We have examined these books of account. There are two columns on each page, relating to the debits and credits. The entries are duly dated. The

(1) (1880) I.L.R., 4 Bom., 576 (583) (2) (1899) I. L. R., 27 Cal., 118.

cash-book begins on each date with the closing balance of the previous date. The entries on each side are totalled at the close of the day and the debits and the credits tally. There is a reference in the cash-book to the corresponding entry in the ledger. The entries in the ledger on the debit and credit sides agree with the entries in the cash-book.

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It is clear, therefore, that these documents are account-books regularly kept in the course of business.

The value of the entries is corroborative and cannot be used as independent evidence to charge any person with liability. It was so held in *Dwarka Das v. Sant Bahsh* (1).

An account-book is not a document which is required by law to be attested and section 68 of the Evidence Act has no application. The prosecution do not allege that the documents have been wholly written or have been written in part by any particular person except as to the entry which has been marked as Exhibit G. The prosecution have established that the said entry is in the handwriting of Narbada Prasad. As to the rest of the entries in the account-books, section 67 of the Evidence Act does not apply.

We hold that the documents in question are admissible in evidence against Jagannath Prasad and Narbada Prasad without any formal proof.

It is to be noted that the documentary evidence completely upsets the defence that the interest of Narbada Prasad in the contract was merely that of a financier, in that he had merely lent money to Jagannath and had no interest in the contract itself.

[The judgement then discussed the evidence.]

The main defence was an allegation of enmity against Rai Bahadur Thakur Jaswant Singh, a Special

(1) (1895) I. L. R., 18 All., 92.

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and Honorary Magistrate in Banda and a large zamindar, the ground of enmity being that some thirteen years ago Narbada Prasad joined in a memorial to the Local Government praying that Thakur Jaswant Singh should not be appointed an Honorary Magistrate. As to this, we have the evidence of a defence witness, Mr. Pearey Lal, in which he says that shortly before the contract in this case Thakur Jaswant Singh told him that Narbada Prasad was a "good man". There is no evidence that Thakur Jaswant Singh took the slightest notice of this memorial, so long ago, to the Local Government, or had the slightest enmity against Narbada Prasad. The reason of the memorial is clear from the evidence of another defence witness, who says that Thakur Jaswant Singh was a strict Magistrate. In a district like Banda, which produced such a District Board, it is not to be wondered that a Magistrate who did his duty would be unpopular with certain persons. It is admitted by Dr. Katju on behalf of Narbada Prasad that there is no evidence on the record of enmity or conspiracy on the part of Thakur Jaswant Singh on which he can rely. We agree entirely with Dr. Katju.

The other branch of the defence was that Thakur Jaswant Singh, together with one Sheo Kunwar, conspired to bring the charge in this case out of enmity. The reason of the enmity as regards Sheo Kunwar was alleged to be that Narbada Prasad was the reversioner of Sheo Kunwar, that Sheo Kunwar adopted the son of one Sheo Balak in order to defeat the claim of Narbada Prasad, and that from that date these conspirators were determined to do something to put Narbada Prasad out of the way. That this is an unfounded accusation is clear from the record itself. The defence evidence shows clearly that the adoption took place in June or July, 1928, and that the investigation by Thakur Jaswant Singh ended in March, 1928, and the Government sanc-

tioned the prosecution of Narbada Prasad in July, 1928. It is clear that the prosecution of Narbada Prasad was well on the way before the alleged cause of enmity ever arose. Further, the reason of enmity alleged might cause Narbada to dislike Sheo Kunwar, but could hardly cause Sheo Kunwar to have enmity against Narbada.

It is clear from the above that the evidence for the prosecution in this case was overwhelming and that there was really no defence to the charge.

[The judgement then criticised the findings of the trial court.]

We allow the appeal of the Local Government, set aside the order of acquittal of the learned Magistrate, direct that Narbada Prasad and Jagannath Prasad be arrested and that, as regards Narbada Prasad, he serve three months' simple imprisonment and further pay a fine of one thousand rupees. As regards Jagannath, we consider that he was merely a servant of Narbada Prasad in this matter and under his influence. We, therefore, sentence him to one month's simple imprisonment. With regard to the sentence on Narbada Prasad, we have given him a longer sentence and a larger fine than otherwise we would have done, had it not been for the nature of the defence. False allegations against innocent and respectable persons of criminal conspiracy to bring false charges, when used as a defence, aggravate greatly the original offence. This type of defence is much too common in India and it ought to be recognized that where a defence of this character is obviously false, that fact ought to be taken into consideration in awarding punishment.

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## APPELLATE CIVIL.

*Before Mr. Justice Sulaiman and Mr. Justice Kendall.*

1929  
March, 6.

MAUJI AND ANOTHER (DEFENDANTS) *v.* BHAGOLE AND ANOTHER (PLAINTIFFS).\*

*Act (Local) No. XI of 1922 (Agra Pre-emption Act), section 12 (3)—“Descended from common ancestor”—Sale by Hindu widow—Pre-emption by her husband's brother.*

Upon a sale by a Hindu widow of property which she has inherited from her husband, her husband's brother has no preferential claim of pre-emption under section 12, clause (3), of the Agra Pre-emption Act, because he and the vendor, i.e., the widow, are not descended from a common ancestor. Descent from a common ancestor of the vendor's husband does not make the section applicable.

*Dr. M. H. Faruqi*, for the appellants.

*Messrs. K. O. Carleton and Krishna Murari Lal*, for the respondents.

SULAIMAN and KENDALL, JJ.:—This is a defendants' appeal arising out of a suit for pre-emption. The pedigree is set forth in the plaint. The plaintiffs are the grandsons of Phul Singh, another grandson of whom was Jugal Kishore who is dead. The vendor is Musammat Sardar, his widow. Both parties are co-sharers in the village, but the plaintiffs claim preference on account of their relationship with Musammat Sardar. The lower appellate court has held that though the vendor Musammat Sardar was not related by blood to the plaintiffs respondents, the latter have a preferential claim as against the defendants appellants. The property held by the widow is a Hindu widow's estate, and the learned Judge has thought that the plaintiffs

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\* Second Appeal No. 670 of 1927, from a decree of H. J. Collister, District Judge of Jhansi, dated the 5th of January, 1927, confirming a decree of Krishna Das, Munsif of Lalitpur, dated the 16th of July, 1926.

being related to her husband have preference. He has conceded that if the property transferred by her were her self-acquired property or her *stridhan* the plaintiffs would not have come within the meaning of section 12, sub-clause (3). Now, in order to succeed the plaintiffs must not only show that they are related to the vendor but must also show that they are descended from a common ancestor. The learned Judge has overlooked this portion of sub-clause (3). Although the plaintiffs are in a way related to Musammatt Sardar, namely by marriage, they have not a common ancestor with her. It therefore seems to us that the plaintiffs do not come within the meaning of section 12, sub-clause (3), inasmuch as they have not an ancestor common with the vendor.

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Our attention has been drawn to the case of *Jagrup Singh v. Indrasan Pande* (1), where the plaintiff, though related to the husband of one of the vendors, was given a decree. The judgement does not show that this point was specifically raised before the learned Judges, and it seems that the respondent did not argue that the plaintiffs did not come within section 12, sub-clause (3), on that account. In an unreported case, *Manrup Singh v. Mahadeo Kuar* (2), decided by another Bench, of which one of us was a member, it was held that descent from a common ancestor of the vendor's husband was not the same thing as that from a common ancestor of the vendor, and that relationship by marriage with the vendor did not entitle the plaintiff to preference under sub-clause (3). We agree with the latter pronouncement. In our opinion the plaintiffs have no preference over the defendants.

(1) (1925) I. L. R., 48 All., 347. (2) S. A. No. 1632 of 1924, decided on the 5th of March, 1925.

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v.  
BHAGOLE.

The appeal is accordingly allowed, the decrees of the courts below are set aside, and the suit is dismissed with costs.

Before Sir Grimwood Mears, Chief Justice, and Mr. Justice Young.

1929  
March, 7.

RIKHAB KUMAR AND ANOTHER (PLAINTIFFS) v. TRIVEDI AND COMPANY (DEFENDANT).\*

*Arbitration—Agreement to refer future differences—Act No. IX of 1899 (Indian Arbitration Act), section 19—Act (Local) No. I of 1912 (U. P. Arbitration Amendment Act), section 2—“Submission”—An abortive arbitration resulting in an invalid award does not exhaust agreement to refer.*

The U. P. Arbitration (Amendment) Act, 1912, section 2 of which modifies the definition of a submission” as contained in the Indian Arbitration Act, has no application to an agreement to refer to arbitration, which was alleged to have been executed at Cawnpore, to which the Indian Arbitration Act applied, and which provided that the arbitration was to be made in Calcutta by two European merchants of that place.

An arbitration ending in an award which is set aside as being invalid is an abortive arbitration, and the agreement to refer is not exhausted thereby.

Mr. *Uma Shankar Bajpai*, for the appellants.

Mr. *Shambhu Nath Seth*, for the respondents.

MEARS, C. J. and YOUNG, J.:—The plaintiffs and the defendants entered into a contract for the purchase of certain plate cuttings, the plaintiffs being the buyers and the defendants being the vendors. The plaintiffs, on the 31st of December, 1925, entered into the ordinary form of contract which provided

\* First Appeal No. 143 of 1928, from an order of Raja Ram, Subordinate Judge of Cawnpore, dated the 9th of July, 1928.

for arbitration in the event of any dispute or difference. A dispute arose and the parties each appointed an arbitrator, and after the refusal of the Bengal Chamber of Commerce to act as umpire, they appointed a Mr. Cameron. For reasons which we need not enter into, the High Court of Calcutta set Mr. Cameron's award aside, and thereupon, on the 21st of June, 1927, the defendants nominated Mr. Lee as their arbitrator, he having been the same gentleman who had sat as arbitrator on their behalf before. The plaintiffs objected to this, probably on the ground that Mr. Lee had already expressed his opinion favourably to the defendants. The plaintiffs made various applications to get the appointment of Mr. Lee, who by lapse of time was said by the defendants to have become sole arbitrator, set aside, and failed. Thereupon, on the 10th of February, 1928, the plaintiffs instituted a suit in the court of the Subordinate Judge of Cawnpore, claiming Rs. 5,000 as damages, the damages being, as the plaintiffs contended, the monetary compensation to which they were entitled by a breach of contract arising under this very engagement of the 31st of December, 1925. Thereupon the defendants applied under section 19 of the Indian Arbitration Act to stay the suit, and Mr. Raja Ram, a Judge of great experience in commercial matters, made the order staying the suit. From that order the plaintiffs have appealed here.

We are of opinion that the learned Subordinate Judge came to a right conclusion, and that the matter is, when one examines the terms of the contract, beyond argument.

The first point to be noticed is that the price of the goods was to be paid in Calcutta, and when one

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turns to the arbitration clause, which is No. 4 of the printed form, it is seen at once that the buyers bound themselves to an arbitration, which, by the terms of clause 4, indicated exactly how and where that arbitration was to proceed.

Clause 4 runs as follows:—"If any question, dispute or difference whatsoever shall arise between sellers and buyers touching this contract, then, and in any such case, sellers will be entitled at their option to require buyers to submit the matter in difference either to the arbitration of two European merchants in the trade in Calcutta (one to be appointed by sellers and one by buyers) or, in the event of their differing, of an umpire appointed by such arbitrators before entering on the reference, or to the arbitration of the Bengal Chamber of Commerce. The award of such arbitrators, umpire or Chamber shall be final and binding on both the parties, either of whom will be at liberty to apply that the same may be filed as a rule of court."

Now that was part of the agreement on the part of the plaintiffs who wanted to get certain goods from the defendants, and who could only get these goods from the defendants if they entered into that form of contract on which the defendants insisted. The plaintiffs are bound by the promise that they made, and the promise, put in words other than those in clause 4, was that if at any time there should be a dispute between the buyers and sellers, the sellers could, if they wished, force the buyers into an arbitration. That arbitration was to be held in Calcutta and two European merchants were to be the arbitrators, one appointed by each party. In the event of the arbitrators disagreeing, the award was to be made by an umpire, and such award was to be final and

binding. There were provisions dealing with the failure of the buyers to appoint an arbitrator or to take part in an arbitration, and in that event the sellers were entitled to proceed *ex parte*, and the award so obtained was to have the same legal effect as if the matter had been fought out after contest with arbitrators on each side and an umpire. That was the bargain, and it necessarily follows that if the plaintiffs desire to break away from it and institute a suit, the court must, under section 19 of the Indian Arbitration Act, stay such a suit.

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Two points have been taken on behalf of the appellants, and one is that there was no proper submission as required by the U. P. Arbitration Act. The answer is that one must look to the contract. The contract provided for an arbitration in Calcutta in the event of any dispute arising. In our opinion the U. P. Arbitration Act has no application whatever to this matter.

The second point that was put forward was that inasmuch as there had been one arbitration and that had been abortive, the agreement contained in clause 4 of the contract had exhausted itself. There has never been an arbitration, there has been an attempted arbitration, which, when examined by the court, was found not in law to have been an arbitration at all, and that was set aside and swept away. The fact that the parties did endeavour to solve their differences by recourse to arbitration and failed does not, in our opinion, in the slightest degree affect the validity of clause 4, and it is no answer to say that the parties went through, what all of them actually believed at the time was, an arbitration in due form, if, when examined by the court, the arbitration was found to have been of no legal effect.

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The consequence is that this appeal must be dismissed and the suit must be stayed in accordance with the order of Mr. Raja Ram.

Before Mr. Justice Sulaiman and Mr. Justice Banerji.

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April, 6.

IMTIAZ BIBI (PLAINTIFF) v. KABIA BIBI (DEFENDANT).\*

*Civil Procedure Code, section 47—Legal representative of deceased judgement-debtor—Claim by legal representative that property is his own and not an asset of the deceased judgement-debtor—Separate suit not maintainable.*

Where the legal representative of a deceased judgement-debtor asserts that the property attached and sought to be sold is his own property, acquired by him under a transfer previous to the attachment, and is not part of the assets of the deceased judgement-debtor, the question is one which comes within section 47 of the Civil Procedure Code. Hence, where no such claim was raised in the execution court and the property was sold and was purchased by the decree-holder, a suit to recover the property, based on such a claim, does not lie. *Seth Chand Mal v. Durga Dei* (1) and *Dulla v. Shib Lal* (2), followed. *Gulzari Lal v. Madho Ram* (3), *Bhagwati v. Banwari Lal* (4) and *Bulaqi Das v. Kesri* (5), distinguished.

Mr. Hem Chandra Mukerji, for the appellant.

Mr. Panna Lal, for the respondent.

SULAIMAN and BANERJI, JJ. :—This case has been referred to a larger Bench on account of an apparent conflict between the case of *Dulla v. Shib Lal* (2) and the case of *Bulaqi Das v. Kesri* (5).

One Abdul Rahman died in 1917 leaving a widow Musammat Kabia Bibi and a daughter as well as three

\* Second Appeal No. 732 of 1926, from a decree of J. N. Mushran, Subordinate Judge of Meerut, dated the 21st of January, 1926, confirming a decree of Mohammad Aqib Nomani, Munsif of Meerut, dated the 17th of August, 1925.

(1) (1889) I. L. R., 12 All., 313.

(2) (1916) I. L. R., 39 All., 47.

(3) (1904) I. L. R., 26 All., 447.

(4) (1908) I. L. R., 31 All., 82.

(5) (1928) I. L. R., 50 All., 686.

brothers as his heirs. One of his brothers, Abdul Karim, promptly made a gift of his share which he had inherited in favour of his wife Musammat Imtiaz Bibi. A suit was brought by Musammat Kabia Bibi for recovery of her dower-debt against the heirs of the deceased by realization of the amount out of the assets left by him. There can be no doubt that the heirs were liable to pay the dower-debt when they took the assets. A compromise decree was passed in favour of Musammat Kabia Bibi against the heirs, including Abdul Karim. Abdul Karim died afterwards and his heirs, including Musammat Imtiaz Bibi his widow, were brought on the record as the legal representatives of the deceased judgement-debtor. Musammat Kabia Bibi decree-holder proceeded to execute the decree and attached the property of her deceased husband in the hands of his heirs, including the share in the possession of Musammat Imtiaz Bibi. No objection appears to have been raised by the latter on the occasion and the property was sold and purchased by the decree-holder Musammat Kabia Bibi herself. Musammat Imtiaz Bibi has now brought the suit for recovery of possession on the ground that it was no part of the assets of the deceased Abdul Karim and could not have been validly sold in execution of a money decree against Abdul Karim. Both the courts below have dismissed the suit on the ground that it was barred by section 47 of the Code of Civil Procedure.

It appears to us that this case is concluded by the ruling in the Full Bench case of *Seth Chand Mal v. Durga Dei* (1) which has been followed in subsequent cases. There, too, a simple money decree was passed against a judgement-debtor who died and his legal representatives were brought on the record in execution proceedings to represent him. They raised the question as to a certain property which they said was no part of the

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deceased's assets in their hands but was their own property. Four out of the five learned Judges held that the case was covered by section 244 of the old Civil Procedure Code. STRAIGHT, J., on page 322 remarked: "I do not think, when the representative of the deceased judgement-debtor says in regard to the property which he contends is not the property of the deceased judgement-debtor but is his property, that it can rightly be said that he thereby sets up a *jus tertii*". He admitted that the case would be different if he were trustee or representing some character wholly separate from his personal and individual character. EDGE, C. J., on pages 323 and 324 also pointed out the same distinction and held that where the representative merely asserts that the property sought to be sold is his own property to which he is beneficially entitled by purchase or from its having come to him otherwise than as a representative of the deceased judgement-debtor, it is not a case in which he has set up a *jus tertii*. The learned Judge also agreed that the case would be different if the representative of the judgement-debtor opposed the execution on the ground that the property vested in him as trustee or as executor of someone else. BRODHURST, J., concurred in that opinion. MAHMOOD, J., also agreed with that view and on page 327 pointed out that a distinction was to be drawn between the capacity of the judgement-debtor as representing his own interest and his capacity as representing an interest which did not vest in him and which one would call a legal *jus tertii*. The learned Judge held that as soon as a person is impleaded and objects against the execution of the decree he is bound, so long as he claims in respect of the property against which execution is sought a right no other than that which vests in him in his own person, to raise those objections in the execution of the decree and cannot be allowed to reagitate the matter in a regular suit. TYRRELL, J., however, dis-

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sented. Although in that case the point arose in appeal and before the property presumably was actually sold, the case is a clear authority for the view that the legal representative of a deceased judgement-debtor, when she is asserting that a certain property is her own property and no part of the assets of the deceased in her hand, is raising an objection relating to the execution, discharge or satisfaction of the decree within the meaning of section 47 of the Civil Procedure Code and that the question is between the representatives of the parties. In the present case, also, Musammat Imtiaz ought to have objected to the attachment of the property in her hands on the ground that it was no part of the assets of her deceased husband but had been acquired by her under a gift previous to the attachment. She was bound to raise this objection if it were good, as she was asserting her own personal rights to the property and was not putting forward the claim of any stranger to the execution proceedings. The case, in our opinion, is therefore fully covered by the ruling in the Full Bench case quoted above, which has never been doubted in this Court. It was expressly followed, as it was bound to be, in the case of *Dulla v. Shib Lal* (1). The only difference between the latter case and the present case is that there the legal representatives were brought on the record before the decree was passed. The principle underlying both is, however, the same.

The rulings in the Full Bench cases of *Gulzari Lal v. Madho Ram* (2) and *Bhagwati v. Banwari Lal* (3) are not directly in point. We would also hold that the case of *Bulaqi Das v. Kesri* (4) does not deal with the point which arises in this particular case and it is not therefore necessary for us to express any opinion on the question decided there.

We accordingly dismiss this appeal with costs.

(1) (1916) I. L. R., 39 All., 47.

(2) (1904) I. L. R., 26 All., 447.

(3) (1908) I. L. R., 31 All., 82.

(4) (1928) I. L. R., 50 All., 686.

Before Mr. Justice Sulaiman and Mr. Justice Sen.

1929  
April, 12.

GURDIAL SINGH (PLAINTIFF) v. ARJUN SINGH AND  
OTHERS (DEFENDANTS).\*

*Act (Local) No. XI of 1922 (Agra Pre-emption Act), section 19—Ex parte decree for pre-emption—Set aside under order IX, rule 13—Acquisition thereafter by defendant of a share in the village—Plaintiff's right not defeated thereby.*

An *ex parte* decree, even though it has subsequently been set aside by the court under order IX, rule 13, of the Civil Procedure Code, is within the scope of the clause "where a decree for pre-emption has been passed" in section 19 of the Agra Pre-emption Act. Where, after the *ex parte* decree had been set aside the defendant vendee obtained by gift a share in the village, the plaintiff's right to a decree for pre-emption could not be defeated thereby, inasmuch as a decree, though *ex parte*, for pre-emption had actually been passed before the defendant's acquisition of the status of a co-sharer.

Mr. Shiva Prasad Sinha, for the appellant.

Mr. Saila Nath Mukerji, for the respondents.

SULAIMAN and SEN, JJ. :—This is a plaintiff's appeal arising out of a suit for pre-emption. The sale deed was executed on the 8th of January, 1923, and a suit for pre-emption was instituted on the 7th of July, 1924. At first an *ex parte* decree was passed against the defendants vendees on the 31st of July, 1924. Subsequently an application for setting aside the *ex parte* decree under order IX, rule 13, of the Civil Procedure Code was presented because there was no personal service on the defendants. The court was satisfied that good cause had been shown and the *ex parte* decree was set aside and the suit was restored on the 10th of January, 1925. After that, on the 28th of April, 1925, the defendants obtained

\* Second Appeal No. 956 of 1927, from a decree of P. K. Ray, District Judge of Mainpuri, dated the 19th of February, 1927, reversing a decree of Kanhaiya Lal Nagar, Additional Subordinate Judge of Mainpuri, dated the 14th of December, 1925.

a gift of a small share in the same village, which placed them on the same footing as the plaintiff. The court of first instance decreed the suit on the 14th of December, 1925, but the appellate court has dismissed it. The lower appellate court has held that by virtue of this gift the defendants were entitled to defeat the plaintiff's suit altogether.

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It has now been held by a Full Bench of this Court in the case of *Ram Saran Das v. Bhagwat Prasad* (1) that a gift taken by a vendee, during the pendency of the suit, which has the effect of depriving the pre-emptor of his right to be substituted in place of the vendee at the time when the decree is to be passed is a good defence to the suit under section 19 of the Act. That section, however, has a further provision that where a decree for pre-emption *has been passed* in favour of a plaintiff, whether by a court of first instance or of appeal, the right of such plaintiff shall not be affected by any transfer or loss of his interest occurring after the date of such decree.

The question before us is whether this provision would govern a case where an *ex parte* decree has been obtained by the plaintiff once, but that decree has been set aside by the same court. It is noteworthy that the tense used in this portion of the section is the present perfect tense, and we think that it would certainly cover the case of an *ex parte* decree once passed even though it has been set aside subsequently.

When an *ex parte* decree is passed the defendant has two courses open to him. He may either apply to the court under order IX, rule 13, of the Civil Procedure Code and if he shows good cause as required by that rule he may have the decree set aside. Or he may appeal from the *ex parte* decree and may on the same ground ask the appellate court to set it aside.

(1) (1928) I. L. R., 51 All., 411.



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In one case the suit will be restored to its original number and in the other it would be remanded by the appellate court. In either case the *ex parte* decree would have been the same. It seems to us that in the case where the suit has been remanded on a reversal of the *ex parte* decree there can be no doubt that nothing which happens subsequent to the *ex parte* decree would prejudicially affect the right of the plaintiff. The same principle will apply to a case where a decree has been set aside by the first court itself. There is nothing in the language of this section which would indicate that the decree passed by the court of first instance must be a subsisting decree up to the time when the loss of the plaintiff's right occurs. We think that if once such a decree has been passed, nothing which happens after that date can affect the rights of the parties. The mere fact that for some reason or another the previous decree has been set aside and the suit restored would not take the case out of the scope of section 19 of the Agra Pre-emption Act.

We are therefore clearly of opinion that in the present case the vendees are not entitled to take advantage of the gift taken by them subsequent to the 31st of July, 1924, on which date the plaintiff succeeded in obtaining "a decree for pre-emption".

We accordingly allow this appeal and setting aside the decree of the lower appellate court decree the plaintiff's suit for pre-emption on payment of Rs. 4,500 within two months from this date.

Before Mr. Justice Sulaiman and Mr. Justice Pullan.

SURAJ MAL AND ANOTHER (DEFENDANTS) *v.* SHANKAR  
AND ANOTHER (PLAINTIFFS) AND PHULO AND OTHERS  
(DEFENDANTS).\*

1929  
April, 22.

Act. (Local) No. XI of 1922 (Agra Pre-emption Act), sections  
14 and 15—Notice to pre-emptors—Service of notice  
necessary.

Under section 14 of the Agra Pre-emption Act it is not enough that a notice by registered post is sent to the persons having a right of pre-emption, but service of the notice on such persons is essential. The use of the word "issue" in section 15 is ambiguous, but reading the whole of that section leaves no doubt that service on the pre-emptors is essential.

Messrs. S. C. Goyle and Peary Lal Banerji, for the appellants.

Dr. Kailas Nath Katju, for the respondents.

SULAIMAN and PULLAN, JJ. :—This is a defendants' appeal arising out of a suit for pre-emption. Before the sale took place a notice was sent by registered post to the plaintiffs, but the lower appellate court has found that this was not actually served on them.

The defendants appealed and on their behalf a ground was taken that the mere posting of a notice was quite sufficient and that service of it was immaterial. This contention cannot be accepted. Section 14 of the Act does not say that a notice is merely to be sent to all the persons having a right of pre-emption but prescribes that the co-sharer proposing to sell may "give notice by registered post to all such persons", which undoubtedly implies that the notice must be given to the persons concerned. The use of the word "issue" in section 15 is

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\* Second Appeal No. 792 of 1927, from a decree of Aghornath Mukerji, District Judge of Meerut, dated the 18th of June, 1926, confirming a decree of Bhagwan Das, Additional Subordinate Judge of Meerut, dated the 15th of February, 1926.

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ambiguous, but reading the whole of that section, particularly the latter portion of it which lays down that the right of pre-emption would be extinguished unless such person within the period of one month of the receipt of the notice communicates his intention to purchase, no doubt is left that service on the pre-emptors is essential. Their right is only extinguished when they allow one month to expire after the receipt of such notice. There is therefore no force in this ground.

The next ground relates to the question of consideration. [This portion of the judgement, not material to this report, is omitted.] We therefore think that there is no force in this appeal and it is dismissed with costs.

Before Mr. Justice Mukerji and Mr. Justice Niamat-ullah.

1929  
April, 26. BAIJNATH (DEFENDANT) v. DHANI RAM (PLAINTIFF).\*

*Court fees—Deficiency in lower court demanded by appellate court from respondent—Non-compliance by respondent—Power to refuse him hearing—Power to refuse him costs.*

Where the respondent (plaintiff), on being called upon by the appellate court to make good a deficiency in the court fee paid by him in the first court, does not comply, the appellate court can not only stay issuing its decree if it be in his favour, but can refuse to hear him on the appeal and can, if the appeal fails, refuse him costs. *Mohan Lal v. Nand Kishore* (1), referred to.

Messrs. B. Malik and Baleshwari Prasad, for the appellant.

Mr. Satish Chandra Das, for the respondent.

MUKERJI and NIAMAT-ULLAH, JJ.:—This is a second appeal by one who was the defendant in the

\* Second Appeal No. 1781 of 1927, from a decree of E. Bennet, District Judge of Agra, dated the 25th of May, 1927, confirming a decree of Y. S. Gahlant, Munsif of Agra, dated the 19th of February, 1927.

(1) (1905) I. L. R., 28 All., 270.

suit. The parties to the suit, at one stage of it, agreed that the Munsif, before whom the suit was, should decide the case, after hearing certain documentary evidence and making an inspection of the locality. They agreed that they would accept the decision of the learned Munsif. On the case being decided by the Munsif, an appeal was filed by the defendant before the District Judge. The District Judge held that the parties had constituted the Munsif an arbitrator and no appeal lay from what was virtually an award. In this view, the learned Judge dismissed the appeal. In this second appeal the view of the learned District Judge has been contested.

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We are of opinion that the view of the learned District Judge is correct and we dismiss this appeal.

On the question of costs we are of opinion that the respondent should not have any. We have refused to hear the learned counsel for the respondent. The reason was this. It was reported that there was a deficiency in the court fee paid by the plaintiff respondent in the court of first instance. The respondent was called upon to make good the deficiency, but he has not done it. The learned counsel for the respondent has urged that the only consequence of the non-payment of the court fee by his client should be that this Court will refuse to "issue the decree" in his favour till he makes good the deficiency. The learned counsel relies on the Full Bench case of *Mohan Lal v. Nand Kishore* (1). In that case the question was whether the respondent, who had failed to make good the deficiency, should have his appeal before the lower appellate court (which had succeeded) dismissed or whether there was some other remedy to compel him to make good the deficiency.

(1) (1905) I. L. R., 28 ALL., 270.

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All that the learned Judges held was that the procedure of dismissing the respondent's appeal before the lower appellate court was not a right procedure, and that the proper thing to do would be to "stay issuing the decree in favour of the respondent, if such should be passed, until such time as the additional court fee due by him may be paid". As we read the judgement, the learned Judges never indicated that this was the only way of bringing pressure on the respondent to make good the deficiency. The Court Fees Act does not provide any means by which the deficiency in court fee can be realized. The courts have always taken it upon themselves to realize it by such lawful means as might be open to them. One of us and the learned CHIEF JUSTICE, sitting together, have more than once held that one of the ways that was open to the court of enforcing payment would be not to hear the counsel for the respondent who was in contempt. We followed this procedure and refused to hear the respondent's counsel in second appeal.

In the result, the appeal is dismissed but without costs.

### APPELLATE CRIMINAL.

1929  
April, 9.

*Before Mr. Justice Dalal.*

EMPEROR v. SIS RAM AND OTHERS.\*

*Indian Penal Code, section 366A—Procuration of minor girl—  
Offering the girl to several persons successively for sale—  
Whether fresh offence for each offer.*

An offence under section 366A, Indian Penal Code, is one of inducement with a particular object, and when after the inducement the offender offers the girl to several persons a fresh offence is not committed at every fresh offer for sale.

\* Criminal Appeal No. 98 of 1929, from an order of D. C. Hunter, Sessions Judge of Moradabad, dated the 17th of December, 1928.

Jail Appeal; the appellant was not represented.

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The Government Pleader (Mr. *Sankar Saran*),  
for the Crown.

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DALAL, J.:—The case is a very clear one. All the appellants have been rightly convicted, and I dismiss the appeal. What delayed my decision for a considerable time was by reason of a second similar charge against Sisram and Debi for seducing the same girl. This refers to appeal No. 97. The learned Judge has not explained the circumstances. What the learned Government Pleader and I gather is that Sisram and Debi were separately tried for offering the girl after seduction to separate persons for sale. An offence under section 366A, however, is one of inducement with a particular object, and when after inducement the offender offers the girl to several persons a fresh offence is not committed at every fresh offer for sale. Several offers for sale evidence the criminal intention of the offender just as much as one offer for sale. Under the circumstances once Sisram and Debi were convicted of seducing the girl, they could not be convicted over again for the same seduction unless in a case where the girl had returned to her parents and then subsequently there had been a fresh seduction. Such is, however, not the case in appeal No. 97. The conviction in the case of appeal No. 97 would have been fully justified if there had not been a previous conviction in appeal No. 98. Under section 397 of the Code of Criminal Procedure this Court has power to direct separate sentences of separate trials to run concurrently. The order in appeal No. 97, therefore, shall be that the sentence in that case shall run concurrently with the sentence in appeal No. 98, and that otherwise the appeal is dismissed.

## REVISIONAL CRIMINAL.

Before Mr. Justice Dalal.

1929  
April, 10.

RISAL SINGH v. BALJIT SINGH AND OTHERS.\*

*Criminal Procedure Code, section 139A—Public right, denial of—Power of Magistrate to require either party to get the question of the right decided by a civil court—Jurisdiction.*

A Magistrate, while staying proceedings in accordance with clause (2) of section 139A of the Criminal Procedure Code, has jurisdiction to direct a party to take proceedings in the civil court for decision of the matter of the existence of the public right in question and to fix a period of time therefor.

Mr. *Saila Nath Mukerji*, for the applicant.

Messrs. *Nehal Chand and Harendra Krishna Mukerji*, for the opposite parties.

DALAL, J.:—As I have previously remarked in several judgements, chapter X of the Code of Criminal Procedure was not revised (with care in 1923 when additions were made to it in accordance with certain rulings of certain High Courts. In section 139A it is not stated who is to have the matter of the existence of a right decided by a competent civil court and what order the Magistrate has to pass in order to reach an end to the criminal litigation. Under clause (2) of that section the Magistrate has to stay proceedings, and obviously the proceedings are not meant to be stayed indefinitely. There should be some period of the stay, and the Magistrate ought to have the power of dismissing the application on the right not being decided by a civil court on motion by a particular party within a certain time. In the present case the question of the authority of the

\* Criminal Reference No. 107 of 1929.

Magistrate to direct a party to take proceedings in the civil court has not been questioned by Mr. *Nehal Chand*, and argument was addressed to me only on the particular facts of the present case as to whether Risal Singh or Baljit Singh should be directed to take proceedings in the civil court. I think that this is the right view taken of the law by Mr. *Nehal Chand* and of the deduction that is to be made both from statute law and from cases decided by this Court.

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Coming to the particular facts of this case, Risal Singh desired that there should be a public road over a particular area of land which is claimed by Baljit Singh as his own. The finding of the Magistrate is: "Taking all the facts in view, it seems to me that there is reliable evidence in support of the denial of the defendants that for some considerable time past there has been no existence of any public right of way as claimed by the complainant." The present decision, therefore, is in favour of the defendant, and if no action were taken the result would be that the complainant's application would be dismissed. Under the circumstances I direct that Risal Singh shall prove the existence of a public right of way over the land in dispute within one year of today's date. in default of which the Magistrate will be at liberty to dismiss his application.



## MISCELLANEOUS CRIMINAL.

*Before Sir Grimwood Mears, Chief Justice.*

MUHAMMAD INAYAT ALI v. EMPEROR.\*

1929  
April, 15.

*Professional misconduct—Legal Practitioner—Refusal to appear in a case against a brother practitioner—Duty of advocate.*

The refusal of a lawyer to take up a brief for a member of the public, simply and solely on the ground that he would be appearing against a brother practitioner who was the litigating party on the other side, or putting forward untrue excuses when the real reason is a disinclination to appear against a brother practitioner, is professional misconduct; that is, it is a breach of the duty which the acceptance of the status of an advocate demands from every man who becomes an advocate.

Mr. *Saila Nath Mukerji*, for the applicant.

The opposite party was not represented.

MEARS, C. J.:—This is an application for the transfer of a case on the very singular ground that local counsel refuse to carry out the obligations which, by their profession, they are bound to do. Quite recently a similar complaint was made by a member of the public, and I then pointed out that the refusal of a lawyer to take up a brief for a member of the public, simply and solely on the ground that he would be appearing against a brother practitioner who was the litigating party on the other side, is professional misconduct; that is, it is a breach of the duty which the acceptance of the status of an advocate demands from every man who becomes an advocate. There is a definite and well-recognized rule, which however does not seem to be understood in this country, that a lawyer must take up a case for any member of the public if—

- (1) a fair and proper fee is tendered to him;
- (2) adequate instructions are given;

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\* Criminal Miscellaneous Case No. 125 of 1929.

(3) the case is of a class which the lawyer is accustomed to do.

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v.  
EMPEROR.

That is the general rule, but he may of course legitimately decline to take up the case if, for instance, he has an outstation engagement, or is engaged in some social function such as a marriage, or is incapacitated by ill-health or any reason which a sensible man would recognize as adequate. But to refuse to take up a case simply and solely on the ground that the advocate will not appear against a brother practitioner, or to put forward untrue excuses when the real reason is a disinclination to appear against a brother practitioner, is, in each case, professional misconduct and can and should be dealt with as such. The reason for the rule is obvious, and if lawyers as a body refuse to act against other lawyers, they would become a class standing above the law, and justice would be denied to the public.

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There is also another matter which, if true, has an unpleasant aspect. The case apparently is that Muhammad Inayat Ali Khan, the applicant, assaulted Khan Bahadur Fazal-ur-Rahman Khan. Whether he did so or not must be a relatively simple matter of fact, and, according to the papers before me, a question of fact on which both sides can be heard and a decision given in the course of an hour or two. I am greatly surprised to find in the affidavit a statement that "most of the leading criminal practitioners are appearing in the case as counsel for the complainant, among them being Hafiz Zakir Ali and Mr. B. Nund, Barrister-at-law." Mr. *Saila Nath* tells me that he understands that at least five gentlemen have already been engaged on this very simple matter to defend and protect the interests of Khan Bahadur Fazal-ur-Rahman Khan. I doubt if this can be correct, because it must be perfectly apparent to Khan Bahadur Fazal-ur-Rahman Khan that two gentlemen are

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more than sufficient adequately to present his case, and that if in fact he did engage others, he would lay himself open to the suggestion that he had done so for the purpose of shutting out Muhammad Inayat Ali Khan from obtaining their services or had brought in friends for the purpose of giving them advertisement. Nobody can seriously suggest that the simple question whether *A* struck *B* at a given place on a given date can require the services of more than one counsel, though it may be reasonable to add a second so that one of them would certainly be present at the hearing.

A copy of this order is also to be sent to Khan Bahadur Fazal-ur-Rahman Khan, because I am sure that he must wish to act with complete propriety in this matter, and I go further and say that it is his duty, from his position at the Bar, to make it clear to the other members of his profession at Shahjahanpur that they should conform to the rules of the profession and most certainly accept the brief against him if the conditions that I have mentioned are fulfilled by Muhammad Inayat Ali Khan. Nobody with the least degree of level-headedness and good sense could, for a moment, suppose that any brother lawyer would regard the appearance in court of a brother practitioner against him as a personal matter. It is not personal in the slightest degree. The conduct of a case in court should be as impersonal as an operation by a surgeon, and for any practitioner to feel that a brother practitioner would be aggrieved on this account shows a lack of understanding of how people with decent instincts behave to each other.

[After some detailed directions, which are here omitted, the judgement concluded.]

Meanwhile I stay the hearing of this case in the court of the learned Magistrate until further orders.

## REVISIONAL CIVIL.

*Before Mr. Justice Mukerji.*

BHAGWAN DAS LACHMI NARAIN (PLAINTIFF) *v.*  
BENGAL-NAGPUR RAILWAY (DEFENDANT).\*

1929  
April, 8.

Act No. IX of 1890 (*Railways Act*), section 77—Notice of claim—"Deterioration"—Delay in delivery—Fall in market rate.

The word "deterioration" in section 77 of the Railways Act includes loss in value owing to delay in delivery and a fall in the market value of the goods consigned. Hence, a suit for the recovery of such loss is not maintainable without the notice required by the section.

Mr. *Ambika Prasad Pandey*, for the applicant.

Mr. *B. Malik*, for the opposite party.

MUKERJI, J. :—This is an application in revision against the decree of the Judge, Small Cause Court, and arises under the following circumstances.

The applicant firm indented some rice from a place called Burdaura, served by the Bengal-Nagpur railway. The goods were consigned to where the applicant lived, namely Deoria, in the district of Gorakhpur. Unluckily, the railway receipt was made out to show that the goods were sent to a place called Jalalpur. In spite of this fact, a part of the consignment arrived at Deoria, nobody could tell how, on the 14th of April, 1927. It was not till the 8th of May, 1927, that the remaining portion of the consignment was received in Deoria and handed over to the plaintiff. The plaintiff applicant, thereupon, brought his suit, out of which this application has arisen, to recover certain amounts of money including a sum of Rs. 230 as damages. The claim for damages was based on the allegation that by the time the goods arrived, the market for the goods (rice) fell and the plaintiff suffered a loss.

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\* Civil Revision No. 5 of 1929.

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The claim on this point was met on two grounds, namely there was in fact no loss, there being no fall in the market value and that, in any case, the plaintiff was bound to give a notice under section 77 of the Railways Act before instituting a suit.

This part of the claim has been dismissed on both the grounds.

If I had thought that the suit could be maintained without a notice, I would have sent back the case for a retrial on the ground that the learned Judge was prejudiced by the fact that the plaintiff had not furnished any particulars of his claim for damages along with the plaint. Nobody had asked the plaintiff to furnish particulars and this omission on the plaintiff's part should not have been the cause of dismissal.

Section 77 of the Railways Act requires that "where a person claims compensation for . . . deterioration . . . of goods delivered to be carried . . .", the would-be plaintiff shall prefer a claim in writing within six months of the date of the delivery of the goods for carriage by the railway. The contention of the respondents is that the deterioration would cover the fall in the market value of the goods concerned. There seems to be a conflict of opinion among the authorities on this point. A Madras case, viz. *Madras Railway Company v. Govinda Rau* (1) and a Lahore case, *India General Navigation and Railway Co. v. Harcharan Das* (2), held that the word "deterioration" would include a loss in the market value of the property and not only a depreciation in the quality of the goods. In a more recent case, *East Indian Railway Company Ltd. v. Diana Mal Gulab Singh* (3) the Lahore High Court held a contrary view, but it does not appear that the previous case in the same court had been brought to its notice.

(1) (1898) I. L. R., 21 Mad., 172. (2) (1912) 15 Indian Cases., 12.

(3) (1924) I. L. R., 5 Lah., 523

A surer guide to the meaning of the word is furnished by the New English Dictionary of Murray. There, the word "deterioration" is shown as bearing the import of impairment of quality *or value*.

It appears to me that cases of late delivery must be occurring very often with the railways, and in such circumstances parties to the consignment would be prone to claim compensation. If the authors of the Railways Act were anxious to provide for loss, destruction, etc of the goods in transit, there was no reason why they should forget to provide for the loss of the value of goods owing to delay in delivery. I am of opinion that "deterioration" does include a loss in the value of the goods consigned owing to a delay in delivery.

The result is that the application fails and it is hereby dismissed with costs.

Before Mr. Justice Dalal.

POKHPAL AND ANOTHER (DEFENDANTS) v. MADHO RAM  
(PLAINTIFF).\*

1929  
April, 25.

*Jurisdiction—Civil and revenue courts—Suit to recover amount of revenue paid by a person wrongly recorded as lambardar—Act (Local) No. II of 1901 (Agra Tenancy Act), sections 159 and 160—Payment not voluntary—Payment lawfully made—Act No. IX of 1872 (Contract Act), section 70.*

The plaintiff, who was recorded as lambardar of a certain property, paid a certain sum of money as Government revenue on citation being issued to him by the revenue authorities. At that time, though recorded as lambardar, he had sold his property to the defendants, who were really liable to pay the revenue. He then sued the defendants in the court of Small Causes for recovery of the sum. He was then no longer lambardar or co-sharer. The defence was that such a suit

\* Civil Revision No. 76 of 1929.

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was cognizable by a revenue court and that the payment, being voluntary, was not recoverable.

*Held* that no suit could lie in the revenue court because the plaintiff was no longer lambardar or co-sharer and could not sue either under section 159 or section 160 of the Tenancy Act of 1901.

*Held*, also, that the payment was not gratuitous and was made lawfully because the plaintiff, whose name continued to be recorded as lambardar, was bound to make the payment; and the case fell within the purview of section 70 of the Contract Act.

*Tulsa Kunwar v. Jageshar Prasad* (1), and *Nath Prasad v. Baij Nath* (2), followed. *Chunia v. Kundan Lal* (3), distinguished.

Mr. *Baleshwari Prasad*, for the applicants.

Mr. *Girdhari Lal Agarwala*, for the opposite party.

DALAL, J. :—The plaintiff Madho Ram, while he was recorded as lambardar of a certain property, paid a certain sum of money as revenue on citation being issued to him by the revenue authorities. At that time, though recorded as lambardar, he had sold his property to the defendants who were really liable to pay the revenue. He sued the defendants in the court of Small Causes for recovery of the sum. The pleas were that such a suit was cognizable by a revenue court, and, secondly, that the payment was a voluntary payment and not recoverable under any section of the Contract Act. No suit can lie in the revenue court because Madho Ram is no longer lambardar or co-sharer and cannot sue either under section 159 or section 160 of the Tenancy Act of 1901. The payment was not gratuitous, and, in my opinion, Madho Ram paid lawfully because his name continued in the village record as lambardar and he was, therefore, bound to make the payment to Government. It was the fault of the defendants that they did not get the plaintiff's

(1) (1906) I. L. R., 28 All., 563. (2) (1880) I. L. R., 3 All., 66.

(3) Weekly Notes 1882, p. 150.

name removed from the village record on obtaining transfer of his property from him. In *Tulsa Kunwar v. Jageshar Prasad* (1) BANERJI, J., held on similar facts that the payment was not made voluntarily or gratuitously and that therefore the case fell within the purview of section 70 of the Indian Contract Act. A similar view was taken in the case of *Nath Prasad v. Baij Nath* (2) by a Full Bench in 1880. The learned counsel for the respondent quoted a ruling of 1881, *Chunia v. Kundan Lal* (3). So far as I understand the facts of that case, the plaintiff was not recorded either as a co-sharer or a lambardar at the date of the payment and was in no way bound to make any payment to Government.

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MADHO  
RAM.

I dismiss this application in revision with costs.

Before Mr. Justice Mukerji and Mr. Justice Niamat-ullah.

CHANDRIKA RAI (APPLICANT) v. SRIKANT RAI  
(OPPOSITE PARTY).\*

1929  
April, 26.

*Guardian and ward—Heir of deceased guardian in possession of ward's property—Order calling for accounts from person not appointed guardian—Order directing him to pay a certain sum upon the accounts—Jurisdiction.*

On the death of a guardian appointed by court under the Guardians and Wards Act, his heir remained in possession of the ward's property, though the heir was never appointed guardian. Subsequently the court appointed another person as guardian, and ordered the heir to furnish accounts of the minor's property in his hands. Accounts being furnished accordingly, they were scrutinized and thereupon the court ordered the heir to pay a certain amount over to the newly appointed guardian. *Held* that the Judge had no jurisdiction to make an order against the heir, who was not a guardian appointed by him but was in possession of the

\* Civil Revision No. 278 of 1927.

(1) (1906) I. L. R., 29 All., 563. (2) (1880) I. L. R., 3 All., 66.

(3) Weekly Notes, 1882, p. 150.



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minor's property as a trespasser. The proper remedy was to direct the newly appointed guardian to institute a suit for accounts against him.

Mr. *Shah Zamir Alam*, for the applicant.

Mr. *Jwala Prasad Bhargava*, for the opposite party.

MUKERJI and NIAMAT-ULLAH, JJ.:—This is an application by one Chandrika Rai against an order passed by the learned District Judge of Ghazipur on the 1st of September, 1927, directing the applicant to pay to the respondent a certain sum of money, which was to be reduced partially in the case of his returning certain bullocks.

It appears that the applicant's father Sukhdeo Rai was appointed the guardian of certain minors. Sukhdeo Rai having died, the applicant continued to be in possession of the minor's property. Sri Kant Rai, the respondent, was then appointed the guardian of the minors. At his instance, or that of the Judge himself, the applicant was called upon to furnish an account of the minor's properties he had in his possession. He furnished an account without any objection. The accounts were scutinized and a Commissioner was appointed. As the result of the Commissioner's investigation and report, the order complained of was made.

The points that have been taken in revision are that the learned District Judge has erred in not treating the report in a certain manner. In our opinion we cannot go into the merits of the case. The revision should, however, succeed on this simple ground that the learned District Judge had no jurisdiction to make an order against the applicant, who was not a guardian appointed by him. If he happened to be in possession of the minor's property, he was so as a

trespasser. The District Judge can certainly direct Sri Kant to institute a suit for accounts against the applicant and in that suit the question as to how much is payable by the applicant may be determined. The applicant will then have a chance of taking his case before an appellate court. As things stand, we cannot scrutinize the evidence that was taken before the District Judge, because we are not sitting in appeal against his order.

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v.  
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RAI.

We set aside the order of the learned District Judge as passed without jurisdiction.

*Before Mr. Justice Mukerji and Mr. Justice Niamat-ullah.*

YUDHISHTIR LAL (DECREE-HOLDER) v. FATEH SINGH  
AND ANOTHER (JUDGEMENT-DEBTORS).\*

1929  
April, 26.

*Civil Procedure Code, section 151—Application for setting aside auction sale—Dismissal for default—Restoration.*

Under section 151 of the Civil Procedure Code a court has jurisdiction to restore an application for setting aside an auction sale, which was dismissed for default of appearance.

Dr. M. L. Agarwala, for the applicant.

Messrs. Peary Lal Banerji and Satish Chandra Das, for the opposite parties.

MUKERJI and NIAMAT-ULLAH, JJ.:—This is an application by one, who was the decree-holder in the court below, for setting aside an order dated the 8th of December, 1927, passed by the second Subordinate Judge of Saharanpur, in the exercise of our revisional power.

The facts are these. The decree-holder brought about the sale of the judgement-debtors' property. The judgement-debtors applied for the setting aside

\* Civil Revision No. 289 of 1927.

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of the sale. The application came up for hearing on the 30th of June, 1927. On that date there was default in the appearance of the judgement-debtors, and their application was dismissed for default, the sale being confirmed automatically. Within a month of this date, namely, on the 26th of July, 1927, the judgement-debtors applied for the restoration of their application and for a re-hearing of it. The learned Subordinate Judge has granted this application by the order under revision.

The point that has been taken is that the learned Subordinate Judge had no jurisdiction to pass an order of restoration, although he professed to act under section 151 of the Civil Procedure Code. We have given the argument our best consideration, and we are of opinion that, whether section 141 of the Civil Procedure Code applies or not, section 151 may safely be applied. In this case the learned Subordinate Judge was satisfied that there was a very good ground for the default committed by the judgement-debtors. If that was so, it was necessary that the applicants should have their application for setting aside the sale re-heard. Justice was done in their favour, and we shall be loath to hold that the Code did not provide any remedy, when section 151 of the Code of Civil Procedure gives wide powers to the court to be exercised where there was no specific provision in it.

On the merits, the learned counsel for the applicant argued that the learned Judge did not consider the case fully and that he quoted the affidavit of only one of the applicants and did not consider whether there was any good ground for the other judgement-debtor to be absent. This is a matter relating to the facts of the case, and if the learned Subordinate

Judge had jurisdiction to entertain the application for restoration of the previous application, we do not think we should interfere on the merits. The application is dismissed with costs.

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*Before Mr. Justice Mukerji and Mr. Justice Niamat-ullah.*

BAIJNATH (DEFENDANT) v. DHANI RAM (PLAINTIFF).\*

*Arbitration by court—Review of judgement—Jurisdiction—  
Civil Procedure Code, schedule II, paragraph 14.*

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Parties to a suit before a Munsif agreed that the Munsif should decide the case on an inspection of the documents filed and of the locality, and they further agreed to accept his decision. The Munsif gave his decision and thereupon an application for review of judgement was filed before him by the defendant on the grounds, *inter alia*, that the decision was vague and indefinite and also incomplete, as all the matters in dispute were not decided. On the question whether the Munsif could not entertain the application for review, because he was an arbitrator,—

*Held* that the Munsif, in accepting the position of an arbitrator, had a two-fold capacity. He was an arbitrator, but he was also the court. If the arbitrator left anything undecided, the parties would be entitled to go to the court and to ask the court to remit the award to the arbitrator. The fact that the two capacities were constituted in the same person should not deprive a party of his right of having matters set right. *Baikanta Nath v. Sita Nath* (1), not approved.

The practice of a judicial officer accepting the position of an arbitrator without the previous sanction of his superior officer, and while the case remained pending in his court, was deprecated.

Messrs. *B. Malik and Baleshwari Prasad*, for the applicant.

Mr. *Satish Chandra Das*, for the opposite party.

\* Civil Revision No. 265 of 1927.

(1) (1911) I. L. R., 38 Cal., 421.

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RAM.

MUKERJI and NIAMAT-ULLAH, JJ.:—In this case the defendant is the applicant before us. A suit was instituted by the plaintiff respondent in the court of the Munsif of Agra with respect to a wall which divided the houses of the parties. The prayers were, (a) a declaration that the wall belonged to the plaintiff, (b) an order for removal of certain encroachments, (c) a perpetual injunction. After the case went to trial, the parties agreed that the Munsif should decide the case on an inspection of the documents filed by the parties and on an inspection of the locality, and they further agreed to accept the decision of the learned Munsif. The result was that the Munsif was constituted, so to say, an arbitrator of the case.

The learned Munsif wrote a judgement and decreed the suit in part. There was an appeal by the defendant which was dismissed by the learned District Judge and we have today dismissed the second appeal (S. A. No. 1781 of 1927).

The defendant, although he filed an appeal, also filed an application for review of judgement before the learned Munsif. His grounds are stated at pages 5 and 6 of the paper book prepared in this revision case. The first point was that the decision of the suit was very vague and indefinite. "The rights of the parties have not been made clear and even the dispute has not been decided." The second point was: "The order is contrary to judgement and it does not decide the points which were to be decided." The third point was, "The judgement shows that the wall at some places belongs to the defendant, but the order is contrary to that."

There were also other points taken. The learned Munsif fixed the 26th of March for hearing of the case. In the meanwhile the record of the case went

before the District Judge before whom the appeal was, and nothing further was done in the matter of the review. On the 26th of March, 1927, the plaintiff appeared before the Munsif and filed his objection to the defendant's application for review of judgement. The record came back to the Munsif after the dismissal of the appeal, but it is not clear on what date. The order that we find below the appellate order on the order sheet is the order of the 10th of August, 1927, which is complained of. It does not appear at all that the counsel for the parties were given notice of this date or were heard.

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The question before the learned Munsif was whether he should allow a review of his judgement. The learned Munsif, in dismissing the application, stated that he was an arbitrator, that his decision was binding on the parties. Having said so, he said: "Application for review does not lie as there is no sufficient cause for review." We are of opinion that the learned Munsif never applied his mind to the application at all. If he had looked into the application, he would have found that there was abundant matter to which his attention could validly be directed. His own decision is not reflected clearly in the concluding portion of the judgement, which is the operative portion. The decree as it stands does not make it clear as to what he found. In these circumstances we must hold and do hold that the Judge did not apply his mind to the application and too summarily dismissed it. He must now apply his mind and decide it.

The learned counsel for the respondent took the objection that it was not open to the Munsif to admit an application for review because he was an arbitrator. The learned counsel has relied on the case of

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*Baikanta Nath v. Sita Nath* (1). We have considered that case. It is not clear on what matter the learned Munsif had admitted a review of judgement. It may be, and very likely that was the case, that he admitted a review of judgement on the merits and gave a judgement which was, to some extent at any rate, contrary to the judgement which he had given at the earlier stage. If that was all that the case decided, we need not disagree with it; but if it really went further, we should, with all respect, disagree with that view.

The Munsif, in accepting the position of an arbitrator, had a two-fold capacity. He was an arbitrator, but he was also the court. If the arbitrator left anything undecided, the parties would be entitled to go to the court and to ask the court to remit the award to the arbitrator. The fact that the two capacities were constituted in the same person should not deprive a party of his right of having matters set right. We thoroughly deprecate the practice of some officers accepting the position of an arbitrator without the previous sanction of his superior officer. Vide paragraph 1292 of the Manual of Government Orders, chapter XLII, Part VII. The position that has been created by the learned Munsif's act is very awkward indeed. It tends to deprive a party of taking exceptions to the award on grounds enumerated in paragraph 14 of schedule II of the Civil Procedure Code. It makes or at least tends to make the provisions in paragraphs 12 or 15, besides paragraph 14, nugatory. The Civil Procedure Code does nowhere contemplate that a court may give up its own duties and take up those of an arbitrator in a suit before it. If an officer should accept such a position,

(1) (1911) I. L. R., 38 Cal., 421.

he should act after the case has gone to some other court. In that case, his own proceedings will be subject to all the rules in schedule II of the Civil Procedure Code and the arbitration will be regular and legal, and the anomalous position that now has arisen will never arise. We trust that our remarks will be borne in mind by the subordinate officers and they would refuse to be constituted the sole arbitrator, even where the parties want to constitute them the sole arbitrator.

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We have considered the judgement of the learned Munsif and the operative portion of it and we do find that a good deal of what is said in the judgement is not to be found in the operative part of it. We do not say anything more, for we are remitting the whole matter to the learned Munsif himself. It may be that when the case goes back, it will be found that the officer has left the place. If that be the case, the fact that a notice was issued by the learned Munsif who decided the case will give his successor jurisdiction to hear the application when the case goes back. On the other hand, if the learned Munsif himself is still the presiding Judge of the Court, no difficulty whatsoever may arise.

We allow the application in revision, set aside the order of the learned Munsif dated the 10th of August, 1927, and direct him to take up the application afresh and consider it on the merits. Costs here and hitherto will abide the result.



Before Mr. Justice Mukerji and Mr. Justice Niamat-ullah.  
 FAQIR CHAND (DEFENDANT) v. HARKISHUN DAS  
 (PLAINTIFF).\*

1929  
 April, 26.

*Civil Procedure Code, section 115; order IX, rule 9—Revision—"Case decided"—Dismissal for default—Restoration—Jurisdiction to revise.*

The setting aside of an order dismissing a suit for default of appearance constitutes a "case decided" within the meaning of section 115 of the Civil Procedure Code, and the High Court has jurisdiction to revise the order of restoration. *Ram Sarup v. Gaya Prasad* (1), applied. *Buddhu Lal v. Mewa Ram* (2), referred to.

Messrs. *Uma Shankar Bajpai, Hazari Lal Kapoor* and *G. S. Pathak* for the applicant.

*Dr. M. L. Agarwala*, for the opposite party.

MUKERJI and NIAMAT-ULLAH, JJ.:—The respondent brought a suit in the court of the Munsif of Bareilly against the applicant, in which the 17th of January, 1928, was fixed for fixing of issues. On that date the case was called, the plaintiff was found absent and the suit was dismissed for default. The same day the plaintiff appeared with an application for restoration; but it appears that the application was actually filed the next day. The learned Munsif, after issuing notice to the other side, restored the suit. The defendant has come up in revision, asking that this order restoring the suit should be set aside.

A preliminary objection has been taken by the learned counsel for the respondent that no revision lies. He relies on the Full Bench case of *Buddhu Lal v. Mewa Ram* (2). In that case what was to be decided was, where a subordinate court had merely decided the question of jurisdiction, whether an application in revision lay in the High Court or not.

\* Civil Revision No. 309 of 1928.

(1) (1925) I. L. R., 48 All., 175. (2) (1921) I. L. R., 48 All., 564.

Three learned Judges as against two held that no application in revision lay. It was laid down that the decision of one of the issues which did not dispose of the whole case was not a "case decided", within the meaning of section 115 of the Civil Procedure Code. In a recent case which came up in revision before this Court, the question was whether the setting aside of a decree, which had been passed *ex parte* by the appellate court, constituted a case fit for revision by this Court. Three learned Judges held that it was a "case" within the meaning of section 115. We are of opinion that the circumstances before us fall within the purview of the later ruling, viz., *Ram Sarup v. Gaya Prasad* (1). We hold that we have jurisdiction to revise the order of the 2nd of June, 1928.

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DAS.

Coming to the merits, we find that while the learned Munsif thought that the plaintiff's conduct was negligent, he did not hold that there was no sufficient cause for the plaintiff's non-appearance when the suit was called for hearing, within the meaning of order IX, rule 9, of the Code of Civil Procedure. The fact that the plaintiff appeared the same day and gave an explanation which satisfied the learned Munsif was sufficient ground for restoration of the suit. There is nothing to revise, and we dismiss the application with costs.

(1) (1925) I. L. R., 48 All., 175.

*Before Mr. Justice Mukerji and Mr. Justice Niamat-ullah.*

DIP CHAND (APPLICANT) v. SHEO PRASAD AND OTHERS  
(OPPOSITE PARTIES).\*

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*Civil Procedure Code, section 115, order XXI, rules 89 and 92(2)—Application for setting aside execution sale—Failure to implead all purchasers—Applicant not bound to ascertain and implead them—Duty on court to give notice to all persons affected—Revision—Scope of section 115, clause (c)—Adopting rule of procedure not warranted by law.*

In execution of a simple money decree the property of the judgement debtor was sold in three lots and was purchased by several persons, some of whom purchased on their own behalf and some on behalf of others. The judgement-debtor applied under order XXI, rule 89, of the Code of Civil Procedure to have the sale set aside. In this application he mentioned the names of the purchasers according to his knowledge, but failed to implead all the real purchasers. He repaired this omission later on, but beyond 30 days after the sale. His application was rejected on this ground. He appealed and being unsuccessful applied in revision.

*Held* that order XXI, rule 89, of the Civil Procedure Code does not require the applicant to nominate any person as the opposite party, and it is not essential that there should be an application in writing in which the auction purchasers must be shown as opposite parties, as defendants are described in a plaint. Order XXI, rule 92(2) indicates that the duty of giving notice to all persons affected should rest on the court or its officials, and there is nothing to indicate that the applicant for setting aside the sale should trace out who are the parties affected by his application and make them parties to it.

*Held*, also, that where a court had acted, as in the present case, by inventing a rule of procedure for itself, which was not warranted by the law, the case was not one of a mere wrong decision on a point of law, and the High Court was not only competent to interfere in revision but should interfere.

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\* Civil Revision No. 251 of 1927.

If the result of a decision by the lower court is an illegal action, or action which may be described as material irregularity, the High Court has jurisdiction to interfere under section 115, clause (c), although the result may have been arrived at by following a ruling of the High Court.

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*Yad Ram v. Sundar Singh* (1), distinguished. *Ishar Das v. Asaf Ali Khan* (2), *Balakrishna Udayar v. Vasudeva Ayyar* (3), *Dhanwanti Kuer v. Sheo Shankar* (4), *Birj Mohun Thakur v. Rai Uma Nath Chowdhry* (5), *Umed Mal v. Chand Mal* (6), referred to. *Karamat Khan v. Mir Ali Ahmad* (7) and *Ali Gauhar Khan v. Bansidhar* (8), disapproved. *Sarvi Begum v. Haider Shah* (9) and *Ramraj Singh v. Rabi Prasad* (10), referred to.

Dr. *Kailas Nath Katju*, for the applicant.

Messrs. *Peary Lal Banerji* and *Shabd Saran*, for the opposite parties.

MUKERJI and NIAMAT-ULLAH, JJ.:—This is an application to revise the order of the Munsif of Chandausi, dated the 16th of June, 1927, and arises under the following circumstances.

In execution of a simple money decree against the applicant his property was sold in three lots on the 10th of March, 1927. One Shiam Behari purchased the lot No. 1. The second lot was purchased on the spot by one Birj Bhukan Saran, but he declared that he was purchasing the same for one Kunwar Bahadur. The third lot was purchased on the spot by one Sarra Mal, but he declared that he was purchasing the property for himself and one Mohammad Raza Khan. On the 2nd of April, 1927, the judgement-debtor put in an application to the court stating that he had deposited the decretal amount and the 5 per cent. on the

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| (1) (1923) I. L. R., 45 All., 425. | (2) (1911) I. L. R., 34 All., 186. |
| (3) (1917) I. L. R., 40 Mad., 798. | (4) (1919) 4 Pat. L. J., 340.      |
| (5) (1892) I. L. R., 20 Cal., 8.   | (6) (1926) I. L. R., 54 Cal., 338. |
| (7) Weekly Notes, 1891, p. 121.    | (8) (1893) I. L. R., 15 All., 407. |
| (9) (1911) 9 A. L. J., 12.         | (10) (1921) 63 Indian Cases, 140.  |

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purchase money, and asked that the sale might be set aside. The application was, as the application itself mentioned, under order XXI, rule 89, of the Civil Procedure Code. In the body of the application the judgement-debtor said that the purchasers were Shiam Behari, Kidar Nath and Sarra Mal. It appears that Brij Bhukan Saran was the clerk of the pleader B. Kidar Nath, and B. Kunwar Bahadur was the brother of B. Kidar Nath. The judgement-debtor, apparently, took the purchase by Brij Bhukan Saran as a purchase by his master, B. Kidar Nath, himself. It also seems to be clear that Sarra Mal's purchase was taken by the judgement-debtor to be entirely for himself without a partner.

One of the purchasers took exception to the application on the ground that the two other purchasers, B. Kunwar Bahadur and Mohammad Raza, had not been impleaded. Thereupon the judgement-debtor asked that notices might be issued to those purchasers also. This application was made more than 30 days after the sale, which, as we have already stated, was held on the 10th of March, 1927.

The learned Munsif held that the application of the judgement-debtor for setting aside the sale must fail, because he had failed "to implead two of the auction purchasers within the period of limitation". Incidentally, we may mention that the sale in favour of Shiam Behari, at any rate, might have been set aside. However, that is a point which has not been discussed before us, and need not be separately considered, in the view we take of the whole case.

The judgement-debtor took an appeal to the learned District Judge, and it was heard by a learned Subordinate Judge. That officer upheld the order of the court of first instance, and dismissed the appeal. The judgement-debtor has come in revision.

A preliminary point has been taken on behalf of the respondents that no revision is competent. The learned counsel has taken his stand on several cases, and the case on which he relies most is the case of *Yad Ram v. Sundar Singh* (1), a case decided by three learned Judges, one of whom dissented from the opinion of the two others. In this case the judgment-debtor sold his property, after the auction sale, and yet applied for the setting aside of the sale. The court of first instance held that the judgment-debtor having sold his property was not a person competent to apply for the setting aside of the sale. In arriving at this conclusion, the learned Judge of the court of first instance followed a decision of this Court in *Ishar Das v. Asaf Ali Khan* (2). It was held by BANERJI, J., that, in the view he took of section 115 of the Code of Civil Procedure as interpreted by their Lordships of the Privy Council in *Balakrishna Udayar v. Vasudeva Ayyar* (3), the High Court had no jurisdiction to entertain the application in revision. His Lordship was of opinion that the only matter in which the High Court could interfere was a matter in which the question of jurisdiction was involved. He pointed out that even clause (c) of section 115 must have "relation to the question of jurisdiction". It was on this ground that the learned Judge declined to interfere. PRIGGOTT, J., gave different reasons for coming to the same conclusion. He thought that it was impossible for him to say that in following a decision of this Court, namely, the case of *Ishar Das v. Asaf Ali Khan*, the court below had acted illegally or with material irregularity. That was in substance the reason why the learned Judge refused to interfere with the order of the court below,

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(1) (1923) I. L. R., 45 All., 425. (2) (1911) I. L. R., 34 All., 186.

(3) (1917) I. L. R., 40 Mad., 793.

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although he noticed that in respect of the actual decision the Allahabad High Court stood singularly alone in its view. WALSH, J., dissented and was inclined to follow, on the merits, the judgement of MULLICK, J., in the case of *Dhanwanti Kuer v. Sheo Shankar* (1). From the report it does not appear that this learned Judge expressed any detailed opinion on the question of jurisdiction.

There can be no doubt that a Full Bench case, although it may be the decision of two learned Judges against the decision of a third, is always entitled to respect from a Division Bench presided over by only two Judges. But what was actually decided in this case of *Yad Ram* is what we have already described. The net result of the opinion of the two learned concurring Judges was that the revision was thrown out. This case can be easily distinguished from the one before us. The question that had to be decided by the court of first instance in *Yad Ram's* case was a question of pure law, namely whether a certain person was or was not entitled, on a correct interpretation of a certain rule of law, to apply for the setting aside of the sale. We are prepared to concede, and indeed we must concede, that a revisional court is not a court of appeal, and it is not every erroneous decision on a point of law or fact that can be corrected by the High Court in its revisional jurisdiction. In the case before us it is not a mere matter of interpretation of law. The court below has required, where the law itself does not require, that it should have before it an application in writing in which certain persons, namely the auction purchasers, should be shown as opposite parties, as the defendants are described in a plaint.

(1) (1919) 4 Pat. L. J., 240.

In our opinion the learned Munsif invented a procedure of his own, quite unwarranted by rule 89, order XXI, of the Code of Civil Procedure. It is not a case of a mere wrong decision on a point of law.

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The learned counsel for the respondents has strongly relied on a dictum of PIGGOTT, J., in the case of *Yad Ram v. Sundar Singh* (1), to be found at page 428. The learned Judge has said that he could not see how the court of first instance could be said to have acted illegally or with material irregularity in following a decision of this Court. With all respect, there is another view of the matter. The *result* of the decision is something entirely different from the reasons of the decision. The result of the decision in the case before his Lordship was that the court of first instance held that the judgement-debtor was not a person entitled to make the application. That decision might be wrong or right. It was arrived at by following a decision of this Court. The following of the decision of this Court constituted the reason of the decision; but the *reason* is something different from the *result*. If the *result* was an illegal action, or action which may be described as material irregularity, this Court would certainly have jurisdiction to interfere under the express language of section 115, clause (c), although the result may have been arrived at in a way which is entirely unexceptionable. We are, therefore, unable to agree with PIGGOTT, J., although we have the highest respect for his opinion.

The learned counsel for the respondent relied on the Privy Council case of *Balakrishna Udayar v. Vasudeva Ayyar* (2) and argued that for our interference under clause (c) of section 115 of the Code of

(1) (1923) I. L. R., 45 All., 425. (2) (1917) I. L. R., 40 Mad., 793.



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Civil Procedure there must be a question of jurisdiction. We have carefully read that case, and we are of opinion that that interpretation should not be put on their Lordships' judgement. It is true that at page 799 of the report their Lordships delivered themselves as follows:—"It will be observed that the section applies to jurisdiction alone, the irregular exercise, or non-exercise, of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved." But, having said so, their Lordships said something further which clearly indicates that all that their Lordships meant to lay down was that the revisional court was not a court of appeal on a question of fact or a question of law. In the very case which was before their Lordships they approved of the exercise of the powers under section 115 of the Code of Civil Procedure by the High Court.

There are many cases in which their Lordships themselves have interpreted the law in the way in which we propose to interpret it. In *Birj Mohun Thakur v. Rai Uma Nath Chowdhry* (1), a purchaser at a court sale made an application for the setting aside of the sale on a ground which could not afford him any relief in the execution department. The learned Judge executing the decree entertained his application and set aside the sale. A Division Bench of the High Court interfered and set aside the Subordinate Judge's order. Their Lordships of the Privy Council approved of the conduct of the High Court. Their Lordships observed, at page 11 of the report, that the Subordinate Judge, in acting as he did, exercised the jurisdiction which did not vest in him and failed to exercise the jurisdiction which he

(1) (1892) I. L. R., 20 Cal., 8.

had. This decision was, no doubt, given under the old Act of 1882; but there is no difference in the present law and the old law.

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The latest pronouncement of their Lordships of the Privy Council will be found in the case of *Umed Mal v. Chand Mal* (1). In this case their Lordships approved of the interference by the Chief Commissioner of Ajmer-Merwara. The grounds on which the Chief Commissioner had interfered were approved of, and their Lordships pointed out that the fact that a person very much interested in the result of the litigation was absent from before the court was itself a sufficient ground for interference by the highest court of appeal, as a court of revision.

We are of opinion that where a court has acted, as in the present case, by inventing a rule of procedure for itself, which is not warranted by the law, the High Court is not only competent to interfere but should interfere.

The learned counsel for the respondents has urged that the Munsif, in refusing to set aside the sale, was only following a case of this Court decided in *Karamat Khan v. Mir Ali Ahmad* (2). The learned counsel said that it being a two Judge case should be followed by us. We have already noticed his argument that the court below should not be said to have acted illegally or with material irregularity because it purported to follow a ruling of this Court. We shall not consider again that argument.

The case in the 1891 Allahabad Weekly Notes has not been followed unanimously in this Court. It was, no doubt, followed by a single Judge in *Ali Gauhar Khan v. Bansidhar* (3), but we have got

(1) (1926) I. L. R., 54 Cal., 338. (2) Weekly Notes, 1891, p. 121.

(3) (1893) I. L. R., 15 All., 407.

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against it at least two later decisions, namely, *Sarvi Begum v. Haider Shah* (1), and *Ramraj Singh v. Rabi Prasad* (2). In these cases two different learned Judges of this Court held that an application for setting aside a sale under order XXI, rule 89, might be made *orally*. If an application could be made orally, how possibly could the decree-holder, or the auction purchaser, be shown, in the oral application as the opposite parties, as is done in the case of a plaint? We may point out that the decision of 1891 Weekly Notes need not be followed on the ground of *stare decisis*. The point raised is one of procedure alone, and not of substantive law. It cannot be said that people have acted on the basis of this ruling for a number of years and have accepted the rule laid down in the case as a substantive rule of law of the country. Further, we may point out that the ruling was given under the old Code, and the present law is, surely, not exactly the same as it was in 1882. We do not say that the result of the language employed in the Act of 1908 necessarily implies that a judgment-debtor asking for the setting aside of a sale after deposit of money should not show the persons interested in opposing the application, as the opposite party. All that we mean to say is that the language is not the same, and the ruling given on consideration of a different language of the Code need not necessarily be binding on us. In the earlier Code (section 310A) nothing was said as to who should be given notice of the application of the judgement-debtor to set aside a sale. Under the present Act, order XXI, rule 92, sub-rule (2), paragraph 2 runs as follows:—"Provided that no order shall be made unless notice of the application has been given to all persons affected thereby." This rule would indicate that the duty

(1) (1911) 9 A. L. J., 12.

(2) (1921) 63 Indian Cases, 140.

of giving notice should rest on the court of its officials. At least there is nothing to indicate that the judgment-debtor, or the applicant for the setting aside of the sale, should trace out who are the parties affected by his application and make them parties to it. The duty sought to be cast on the applicant implies an investigation as to who are the actual purchasers and who have purchased for whom. The short period of 30 days might be materially shortened if the judgment-debtors were called upon to hold an investigation into the matter. There is no rule which says that the time occupied in obtaining a copy of the report of the sale officer would be excluded from the period of 30 days. For all these reasons we are of opinion, with all respect, that the case of *Karamat Khan v. Mir Ali Ahmad* (1) is no longer good law and is not binding upon us.

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Coming to the merits of the case, we have given sufficient indication to show that we are of opinion that the application should succeed. Rule 89 does not require the party making the application to nominate any person as the opposite party. The facts of this very case show how difficult it may be for the applicant to discharge this duty in certain circumstances. The judgment-debtor appears to have been actually present on the spot, yet he was misled as to who were the actual purchasers. There is no question of "bringing anybody on the record." The learned Judge who decided the case of *Ali Gauhar Khan v. Bansidhar* (2), speaks of the decree-holder being "brought on the record." The execution case was one in which the decree-holder was a principal actor, and no question of his being brought on the record could arise. The auction purchaser and the

(1) Weekly Notes, 1891, p. 121. (2) (1893) I. L. R., 15 All., 407.

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decree-holder being already on the record, the unnecessary procedure of showing them as the opposite party cannot be insisted upon, unless there was a clear warrant to the effect in rule 89. In the result, we allow the application in revision, set aside the orders of the learned Munsif and the Subordinate Judge, and set aside the sale.

### APPELLATE CIVIL.

*Before Mr. Justice King and Mr. Justice Bennet.*

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RAM SARUP AND OTHERS (PLAINTIFFS) *v.* RAM RICHHPAL  
AND OTHERS (DEFENDANTS).\*

*Mortgage—Subrogation—Property comprised in second mortgage being a fraction of that in the first—Third mortgagee and another person together paying off first mortgage—Third mortgagee gets priority over the second to the extent of a corresponding fraction of his contribution.*

Where the third mortgagee and another person together paid off the first mortgage in full, *held*, on suit by the second mortgagee, that the third mortgagee was entitled to priority over the second to the extent of the sum which he had contributed for the discharge of the first mortgage; but as the property comprised in the second mortgage was only a fraction of that comprised in the first, the right of priority would be limited to the corresponding fraction of the amount contributed.

*Hanumanthaiyan v. Meenatchi Naidu* (1), distinguished. *Saminatha Pillai v. Krishna Ayyar* (2), followed.

Messrs. P. L. Banerji and H. P. Sen, for the appellants.

Dr. Kailas Nath Katju and Mr. Misri Lal Chaturvedi, for the respondents.

\* Second Appeal No. 2145 of 1927, from a decree of S. Nawab Hasan, Additional Subordinate Judge of Bulandshahr, dated the 2nd of June, 1927, reversing a decree of Brijnandan Lal, Additional Munsif of Bulandshahr, dated the 9th June, 1926.

(1) (1911) I. L. R., 35 Mad., 183. (2) (1913) I.L.R., 38 Mad., 548.

KING and BENNET, JJ. :—This appeal arises out of a suit to recover the money due on a simple mortgage, dated the 11th of May, 1910, executed by Husain Khan and Nawab Khan in favour of Kcore Mai and Tulshi Ram as security for a sum of Rs. 800. Defendants Nos. 1 to 8 are heirs of the mortgagors. Plaintiffs Nos. 1 to 6 are heirs of the mortgagees. Bhup Singh, original defendant No. 11, was a subsequent mortgagee, who died during the pendency of the suit and whose heirs are now upon the record as defendants Nos. 11 to 14. Defendant No. 15, Chiranji Lal, was a subsequent purchaser.

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The suit was contested by Bhup Singh and Chiranji Lal mainly on the ground that the mortgaged property situated in the town of Gulauthi is not liable to sale, and that Bhup Singh and Chiranji Lal had discharged a decree obtained on a prior mortgage and therefore had priority to the extent of the amount paid by them in discharging the prior mortgage.

The trial court repelled the defendants' contentions and decreed the claim in full.

The lower appellate court gave effect to the contention of Bhup Singh's representatives to the effect that they had priority to the extent of Rs. 3,063-9-0 which Bhup Singh had paid in satisfaction of the decree obtained by Faqir Chand on the basis of a mortgage dated the 29th of March, 1904. It may be mentioned that the appeal of Chiranji Lal abated in the court below as he died in November, 1926, and no representatives had been brought upon the record within the prescribed period. The court below, therefore, only had to consider the rights of Bhup Singh's representatives, and we also must leave out of account the claim made by Chiranji Lal.

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It has been found as a fact by the court below that when Faqir Chand obtained his decree on the basis of his mortgage dated the 29th of March, 1904, the decretal amount was paid off by Bhup Singh and Chiranji Lal to the extent of Rs. 3,063-9-0 and Rs. 1,000, respectively, and thus the mortgage was redeemed in full.

The court below held that Bhup Singh was entitled to priority to the extent of the sum which he had paid for the redemption of the prior mortgage, together with interest at 6 per cent. from the date of payment. The learned Subordinate Judge passed a decree allowing the plaintiffs' claim for Rs. 2,000 with costs and interest. He further directed that after the final decree is passed, first the property situated in the village of Faizabad be put up to sale and if its sale proceeds be sufficient to satisfy the amount of the decree, the other property of the town of Gulauthi should not be put to sale. But in case the property of the village of Faizabad be not sufficient to satisfy the decree, then he directed that the entire property of the town of Gulauthi, which was mortgaged in the mortgage of the 29th of March, 1904, would be put to sale, and out of the entire sale proceeds of both the properties of Gulauthi and Faizabad the amount of Rs. 3,665-13-6 will first go to the defendants Nos. 11 to 14 and the remainder will go to satisfy the decree, and the surplus, if any, would go to the other defendants. It must be explained here that in the earlier mortgage of the 29th of March, 1904, the whole 44 sihams of Gulauthi had been mortgaged. In the mortgage which is the basis of the present suit, only 23 sihams out of the 44 had been mortgaged together with 23 sihams out of 44 in mauza Faizabad.

The first point taken by the learned advocate for the appellants is that Bhup Singh can have no priority in respect of the payment made by him in discharge of the prior mortgage, because he did not pay the full amount necessary to discharge that mortgage. As we have already mentioned, Bhup Singh paid Rs. 3,063-9-0, whereas the balance of Rs. 1,000 was paid by Chiranji Lal. Bhup Singh and Chiranji Lal between them, therefore, certainly did extinguish the prior mortgage, but Bhup Singh himself only paid a portion of the money necessary for discharging that mortgage. The ruling in *Hanumanthaiyan v. Meenatchi Naidu* (1), has been relied upon in support of the contention that payment of a portion only of the money required for the discharge of a prior mortgage cannot give the person who makes the payment any priority. In that ruling it was held that where there are two mortgages on a single property and a person advances money for the payment of the first mortgage, the claim of such person to priority over the second mortgage cannot be sustained unless the first mortgage is entirely discharged. This ruling does not help the appellants, since it only lays stress upon the necessity for the entire discharge of the prior mortgage. In the present suit it is found that the prior mortgage has been entirely discharged. The other rulings cited by the learned advocate for the appellants are to the same effect that the entire discharge of the prior mortgage is necessary, but they do not go so far as to say that if the prior mortgage is discharged by two persons, each of whom contributes a share of the money, then neither person acquires any priority in respect of such discharge.

(1) (1911) I.L.R., 35 Mad., 193.

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On the other hand, a ruling has been cited by the learned advocate for the respondents, *Saminatha Pillai v. Krishna Ayyar* (1), in which it was held that a subsequent mortgagee who advances money towards the discharge of a first mortgage on a property is entitled to priority over an intermediate mortgagee to the extent to which the money advanced by him went towards discharging the first mortgage. The facts of that case are very similar to the facts of the case before us. In that case a prior mortgage deed had been completely discharged. Rupees 300 had been advanced by a subsequent mortgagee, and the balance of Rs. 50 had been paid by the mortgagor himself. It was held that although the subsequent mortgagee did not advance the whole of the money required for discharge of the prior mortgage, he was entitled to priority over an intermediate mortgagee to the extent of the money advanced by him for discharge of the prior mortgage. This ruling is directly applicable to the facts of this case and we see no reason for not following it. We find, therefore, that Bhup Singh was entitled to priority over the plaintiff, who was an intermediate mortgagee, to the extent of the sum which he paid towards the discharge of the prior mortgage dated the 29th of March, 1904.

The next point is that the court below was wrong in allowing the defendants Nos. 11 to 14, i.e., the representatives of Bhup Singh, any share in the sale proceeds of the village Faizabad. Here we must accept the appellants' contention. Bhup Singh had no interest whatever in the village of Faizabad, and we see no reason why his representatives should be entitled to any share of the sale proceeds of that village.

(1) (1913) I.L.R., 38 Mad., 548.

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Another objection has been raised to the direction contained in the decree of the court below, that after the sale of the property in village Faizabad the entire property of the town of Gulauthi, which was mortgaged in the mortgage of the 29th of March, 1904, should be put to sale. Here again we think the court below was clearly wrong. The plaintiff is a mortgagee of only 23 out of 44 sihams of the town of Gulauthi, and he only asked for sale of that share. We see no justification for ordering sale of property which is not included in the plaintiff's mortgage deed and which he never sought to put to sale. In our opinion, only the 23 out of 44 sihams included in the mortgage in suit can be put to sale.

The last point argued is that even if Bhup Singh is entitled to priority in respect of the sum which he paid towards the discharge of the prior mortgage, he is only entitled to an amount proportionate to the share of Gulauthi which is being sold, i.e., 23/44 of the sum which he paid. No authority has been cited before us by either party on this point. Bhup Singh is entitled to priority in respect of the sum which he paid towards the discharge of the prior mortgage which covered the whole 44 sihams of Gulauthi. Now the plaintiff is only seeking to put to sale 23 out of 44 sihams of Gulauthi, and in our opinion it would be just and equitable that Bhup Singh should get priority to the extent of 23/44 of the sum which he paid in discharge of the prior mortgage.

We therefore vary the decree of the court below on this point by declaring that Bhup Singh's representatives, defendants Nos. 11 to 14, will be entitled to 23/44 out of Rs. 3,665-13-6 which was decreed to them by the court below.

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We accordingly allow the appeal in part and modify the decree of the court below by ordering (1) that the property situated in village Faizabad be put to sale first, and the sale proceeds thereof shall be wholly paid to the decree-holder and shall in no circumstances be paid to the defendants, and (2) that in case the property of the village of Faizabad be not sufficient to satisfy the decree, then the 23 sihams out of 44 sihams of the town of Gulauthi, which were mortgaged in the mortgage deed in suit, shall be put to sale, and out of the sale proceeds of these sihams the amount of 23/44 of Rs. 3,665-13-6 will first go to defendants Nos. 11 to 14 and the remainder will go to satisfy the decree, and the surplus, if any, will go to the other defendants. Parties will bear their own costs in this Court.

*Before Mr. Justice Niamat-ullah and Mr. Justice Bennet.*

JOHARI MAL AND ANOTHER (PLAINTIFFS) v. BALMAKUND  
AND OTHERS (DEFENDANTS).\*

1929  
April, 30

*Act (Local) No. II of 1901 (Agra Tenancy Act), section 146—  
Distraint—Misappropriation of crops—Suit for compensation—Jurisdiction—Civil and revenue courts.*

A suit by a tenant for recovery of the value of crops, on the allegations that the landlord had distrained and then misappropriated them and had thereafter obtained a decree for the arrears and realized it from the tenant by execution, is not a suit within the purview of section 146 of the Agra Tenancy Act, 1901, and is cognizable by the civil court.

Dr. M. L. Agarwala, for the appellants.

Dr. N. C. Vaish, for the respondents.

\* Second Appeal No. 1391 of 1927, from a decree of Ganga Prasad Varma, Subordinate Judge of Bulandshahr, dated the 21st of April, 1927, confirming a decree of Ratan Lal, Munsif of Khurja, dated the 25th of October, 1926.

NIAMAT-ULLAH and BENNET, JJ.:—This appeal <sup>1929</sup> arises out of a suit brought by the plaintiffs appellants JOHARI MAL in the court of the Munsif of Khurja for recovery of v. BALMAKUND. Rs. 1,600, being the value of the crops which the defendants first party (defendants Nos. 1 and 2) are alleged to have misappropriated. Defendant No. 1 is the landlord of the holding of which one Lahori is the occupancy tenant. Plaintiff No. 1 (Johari Mal) is the sub-tenant holding it from the latter. Plaintiff No. 2 and defendants second party (defendants Nos. 3 and 4) cultivated the land in 1332 F. under a *batai* arrangement with the plaintiff No. 1. Rent having fallen in arrears in 1332 F., the defendant No. 1 distrained the *rabi* crops on the 19th of March, 1925, and appointed his servant, defendant No. 2, as the *shehna*. The plaintiffs' case is that on the 7th of April, 1925, the crops were taken away by the defendants first party, who misappropriated the same, and that sometime afterwards the defendant No. 1 obtained a decree for arrears of rent which the plaintiff No. 1 had to satisfy to avoid a threatened arrest in execution of that decree. It is also mentioned in the plaint that plaintiff No. 1 filed a complaint in the criminal court, presumably charging the defendants first party with the offence of criminal misappropriation; but it was unsuccessful. The defence, so far as it is material to notice, was that the plaintiff No. 2 and the defendants second party, in collusion with plaintiff No. 1, dishonestly carried away the crops in spite of distraint, that the suit is cognizable only by the revenue court and that it is barred by limitation.

The suit has been thrown out by both the lower courts on the ground that it is within the exclusive jurisdiction of the revenue court. The plaintiffs appeal to this Court.

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It should be noticed that the lower courts dismissed the suit instead of returning the plaint for presentation to the revenue court, as should have been done. The reason assigned by the lower appellate court for this course is that the suit, if instituted in a revenue court, would be time-barred. If the civil court has no jurisdiction to entertain the suit, it has none to decide the question of limitation, nor is it open to the civil court to decide the question of limitation for the revenue court in anticipation. The plaint should have been returned for presentation to the proper court, leaving it to the plaintiffs to present it before the revenue court or not, as they may be advised. The order of the lower court must be modified to that extent in any view of the case.

On the main question arising between the parties, viz., whether the civil court has jurisdiction to entertain a suit of this character, it cannot be disputed that a civil court has such jurisdiction unless it is excluded by some rule of law. The lower courts have held that the present suit is one of those which are declared by section 167, read with schedule IV, Group (A), No. 6, and section 146 of the Tenancy Act, II of 1901, to be exclusively cognizable by the revenue court. If it is a suit of the description given in section 146, there can be no doubt that the courts below were right. Bearing in mind the allegations contained in the plaint which attributes to the defendants first party a criminal misappropriation of the crops,—I interpret it in that sense—it will be found that the suit is not within the purview of section 146. That section runs as follows:—

“If any person under colour of this Act distrains or sells, or causes to be sold, any property otherwise than according to the provisions of this Act,

or if any distrained property is lost, damaged or destroyed by reason of the distrainer not having taken proper precautions for the keeping and preservation thereof,

or if the distraint is not immediately withdrawn when it is required to be withdrawn by any provision of this Act,

the owner of the property may institute a suit against the distrainer for compensation for any injury which he has thereby sustained.

If the distrainer is an agent or servant, his principal may be joined as a defendant in the suit."

The sale referred to in the section is what must follow every distraint and should be made in the manner laid down by the Act (see section 128 *et seq*). If the distrainer sells it in any other manner, he can be sued before the revenue court for damages arising out of such an irregular sale. The present suit does not complain of any sale and is obviously not covered by the first paragraph of the section. The plaintiffs do not likewise complain that the crops were "lost, damaged or destroyed by reason of the distrainer not having taken proper precautions". The second paragraph which clearly contemplates a case of negligence on the part of the distrainer and the damages arising therefrom cannot be so construed as to include the case of deliberate misappropriation, as is alleged in the present case. That part of the section, therefore, does not apply. The lower appellate court considers the third paragraph to be applicable, because subsequently a decree for rent was obtained and satisfied by the plaintiffs. It argues that "there is a provision that if a distraint is not immediately withdrawn when it ought to be legally withdrawn, then a suit for compensation for any injury sustained by the owner of the property against the distrainer is covered

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by this section. When a distraint is legally withdrawn the distrainer is bound to place the distrained property in the custody of its owner and if he fails to do that, i.e., if he fails to restore the property, the owner of the property can sue under this section." I cannot accept this reasoning, which is based on a distorted view of the plain language employed in the section. It provides for a case where the property is under distraint and continues to be so when it ought to be withdrawn. In the case before us the plaintiffs allege—and we must accept their allegation in determining the question of jurisdiction—that the crops were misappropriated shortly after distraint, that sometime afterwards a decree for arrears of rent was obtained and execution of that decree was applied for by arrest of the plaintiffs (see paragraph 9 of the plaint). If their case is true, there was no property left and no subsisting distraint which could be withdrawn at the time the decree was satisfied. It should be remembered that the crops under distraint are to be stored by the cultivator or, if he neglects, by the distrainer "in some convenient place in the neighbourhood" (see section 124), so that, when the distraint is withdrawn, the crops can be physically available to the cultivator. It is also relevant to refer to section 128, which requires the distrainer to take steps for sale through the sale officer within five days after distraint. It is clear to my mind that the plaintiffs' suit is not for compensation for injury sustained by them in consequence of the distraint not having been withdrawn when the law required it to be withdrawn. It is not permissible for a court to disown jurisdiction by assigning to the suit a character which it was not intended by the plaintiffs to have and which cannot be assigned to it without resorting to a far fetched theory

not based on the allegations contained in the plaint 1929  
and on a proper consideration of the entire frame of JOHARI MAL  
the suit. There is no other provision in section 146 v.  
which gives jurisdiction to the revenue court in respect BALMAKUND.  
of a suit of this character. We must give effect to the  
law according to the plain meaning of the language  
employed, and should not consider whether it would  
be more expedient to have a suit of this kind tried by  
a revenue court. It is not difficult to discern the line  
of demarcation between the jurisdictions of civil and  
revenue courts in this respect. The Tenancy Act per-  
mits distraint under the supervision of the revenue  
court. Any irregularity in following the procedure  
laid down by the Act in that behalf and the injury  
resulting from such irregularity may well be left to  
be dealt with by the revenue court; but the broader  
questions arising in actions based on tort are not  
excluded from the jurisdiction of the civil court,  
which is more competent to deal with them.

For the reasons stated above, we are of opinion  
that the suit of the plaintiffs as framed was rightly  
instituted in the civil court. We set aside the orders  
of the courts below and direct the court of first instance  
to entertain the suit instituted by the plaintiffs and  
proceed to try it according to law.



*Before Mr. Justice Mukerji and Mr. Justice Niamat-ullah.*

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May, 7

KISHAN SARUP (DEFENDANT) *v.* BRIJRAJ SINGH AND ANOTHER (PLAINTIFFS) AND BABU RAM (DEFENDANT).\*

*Hindu law—Sons' liability for father's debts—Pre-partition debts of father—Partition between father and sons after creditor's suit against father—Attachment before judgement—Execution of decree against divided sons—Suit for partition by minor sons—Whether such suit of itself effects separation—Bona fides of partition.*

A joint Hindu family consisted of a father and his two minor sons. The father incurred debts on promissory notes and the creditor sued the father alone for recovery of his money and also got the family property attached before judgement. Thereupon the minor sons brought a suit for partition of their share against the father; to this suit the creditor was not made a party. The creditor's suit was decreed first. Later, the suit for partition was decreed *ex parte*, and then the sons sued for a declaration that the two-thirds share which the partition decree declared them to have in the family property was not liable to be proceeded against in execution of the decree obtained by the creditor.

*Held* that the sons' share, separated by the partition, could be sold in execution of the creditor's decree against the father.

*Per* MUKERJI, J.—If the well-wishers of the minor sons, believing they could save two-thirds of the property by suing for partition, sued for it and meant it to be effected, the partition was, in this sense, in good faith.

Partition not being an alienation but only an alteration in the mode of enjoyment by the same parties, the partition was not affected by the attachment before judgement.

The substantive right of the creditor, in the case of a father's debt not tainted with immorality, to proceed against the family property cannot be defeated by the father and sons coming to a partition. The family property does not cease to be the family property, or change its character or

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\* First Appeal No. 190 of 1926, from a decree of H. Beatty, Additional Judge of Moradabad, dated the 6th of April, 1926.

liability, because of a decision to enjoy it separately and no longer jointly by the father and sons. What was joint family property in the hands of the father at the date of his incurring the debt may be proceeded against by the creditor, although some of the property is now in the hands of the sons, to realise the decree passed against the father.

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*Per* NIAMAT-ULLAH, J.—The partition at the instance of the minor sons in the circumstances of the case was evidently promoted by a desire to defeat the rights of the creditor and was not made in good faith and could be ignored by the creditor.

Assuming the partition to have been made in good faith, the remedy of the creditor was not impaired thereby. The liability of the sons which arises before a partition between them and their father can not be affected by a partition which the father and sons may choose to make and to which the creditor is not a party.

The decree obtained against the father was binding on the sons as they would be deemed to have been represented by the father in the suit. Whether the sons were represented by the father or not depends upon the subject matter of the suit and if it was a debt which, not being tainted with immorality, was binding on the sons, the sons must be deemed to have been parties to the suit through the father.

But a decree obtained against a father after disruption of the family can not be executed against the sons; for after disruption the sons are no longer represented by the father in any suit brought by the creditor. In such a case if the creditor desires to proceed against the divided property in the hands of the sons, he must obtain a decree against the sons themselves.

The filing of the suit for partition by the minor sons did not of itself effect a separation, inasmuch as it was a matter of discretion of the court to grant or refuse a partition at the instance of minors; and in such a case the separation would be deemed to take place only if and when a decree for partition was passed. In the present case the separation must, therefore, be deemed to have taken place after the creditor had obtained his decree.

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*Subramania Ayyar v. Sabapathy Aiyar* (1), and *Jagan-natha Rao v. Viswesam* (2), followed. *Vinjamampati Peda Venkanna v. Sreenivasa Deekshatulu* (3), disapproved. *Annabhat v. Shivappa* (4), and *Kulada Prasad v. Haripada Chatterjee* (5), approved. *Ram Ghulam v. Nand Kishore* (6), disapproved. *Sita Ram v. Beni Prasad* (7), approved. *Gaya Prasad v. Murlidhar* (8), disapproved. *Jageshwar v. Manni Ram* (9), approved. *Masit Ullah v. Damodar Prasad* (10), *Nanomi Babuasin v. Modhun Mohun* (11), *Brij Narain v. Mangal Prasad* (12), and *Sheo Shankar Ram v. Jaddo Kunwar* (13), referred to.

Dr. *Kailas Nath Katju* and Messrs. *Peary Lal Banerji* and *Hari Ram Jha*, for the appellant.

Mr. *Shambhu Nath Seth*, for the respondents.

MUKERJI, J. :—This is an appeal by one who was the defendant No. 1 in the suit out of which this appeal has arisen. There was a family consisting of three persons, namely Babu Ram, the father (the defendant No. 2 in the suit), and his two sons Brijraj Singh and Raghuraj Singh, the plaintiffs respondents. The family was a joint one. The plaintiffs were, respectively, 8 years and 9 months old at the date of the institution of the suit. The father, Babu Ram, borrowed money from the appellant Lala Kishan Sarup from time to time on promissory notes and Kishan Sarup instituted a suit for recovery of his money against the father alone on the 14th of November, 1925. Thereupon, the two plaintiffs of the present litigation filed against their father a suit, to which the appellant was not made a party, for partition, on the 18th of November, 1925. The decree in the appellant's suit against Babu Ram was passed on

(1) (1927) I.L.R., 51 Mad., 361.

(3) (1917) I.L.R., 41 Mad., 136.

(5) (1912) I.L.R., 40 Cal., 407.

(7) (1924) I.L.R., 47 All., 263.

(9) (1927) I.L.R., 2 Luck., 561.

(11) (1885) I.L.R., 13 Cal., 21.

(2) (1924) I.L.R., 47 Mad., 621.

(4) (1923) I.L.R., 52 Bom., 376.

(6) (1925) I.L.R., 4 Pat., 469.

(8) (1927) I.L.R., 50 All., 137.

(10) (1926) I.L.R., 48 All., 518.

(12) (1923) I.L.R., 46 All., 95.

(13) (1914) I.L.R., 36 All., 383.

the 15th of December, 1925. The partition suit was decreed *ex parte* on the 13th of January, 1926. Having got their preliminary decree for partition, the plaintiffs respondents instituted the present suit to obtain a declaration that the appellant, Kishan Sarup, was not entitled to execute his decree against the two-thirds share that has been declared by the partition decree to be the plaintiffs' property. They also asked for a perpetual injunction restraining Kishan Sarup from executing his decree against those shares. It does not appear that the preliminary decree for partition was ever followed by a final decree or by actual partition of the family property.

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The basis of the claim of the respondents was that the father Babu Ram fell into bad company and squandered money on immoral purposes. The plaintiffs have got their two-thirds share separated by partition and therefore the father's debts are not recoverable from the plaintiffs' two-thirds share. It will be noticed that the plaintiffs did not say that their father's debts were, in any way, tainted with immorality. An issue, however, was framed on that point, so we have taken it for granted that there was such a pleading as that, on behalf of the plaintiffs.

The defence of the appellant was that the father had a good character and was frugal in his habits, that the debts were not tainted with immorality, that the partition took place after the family property had been attached before judgement and the partition was ineffective as against the realization of the plaintiff's debts, that the partition was a collusive transaction and that the entire property of the family in the hands of the father and the sons was bound to pay the plaintiff's debts.

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The learned District Judge who tried the suit came to the conclusion that the debts contracted by the defendant No. 1 with the appellant were tainted with immorality, that the partition was one effected in good faith, that it was not vitiated by the attachment before judgement and that the result of the partition was that the property in the hands of the sons could not be proceeded against by the appellant.

In appeal all the findings of the learned District Judge have been challenged. The points that we have to determine, therefore, are—

(1) Whether the debts on foot of which the appellant obtained his decree were tainted with immorality?

(2) If not, whether the fact that the plaintiffs obtained a partition decree exempts their two-thirds share from being taken in execution of the decree passed against their father?

(3) What is the effect of the attachment before judgement on the partition?

(4) Whether the partition was effected in good faith?

*Point No. 1.*

[The judgement discussed the evidence on this point and proceeded.]

In the result I hold that the plaintiffs have utterly failed to prove that the debts on which the appellant obtained his decree were in any way tainted with immorality.

*Point No. 4.*

On the question whether the partition was effected in good faith, we may take it that it was effected in good faith. If the idea was, as it must have been, that the partition would save two-thirds of the family

property from payment of the just debts of the father, a partition with this object may have been really sought for. How far it will succeed in its object will be considered under Issue No. 2. But if the well-wishers of the sons believe that they can save two-thirds of the property by merely suing for partition, there would be no reason to think that a partition was not *meant* to be effected. In this sense, and in this sense alone, I am prepared to hold that the partition was asked for in good faith. There was no question of the father and the sons finding it inconvenient to live together. But that need not be the only reason for separation of the family.

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*Point No. 3.*

I have already mentioned that the appellant, as soon as he filed his suit on the promissory notes, obtained an order for attachment before judgement. The question is whether that attachment in any way stands in the way of the partition suit. Partition is not alienation. The result of partition is only this, that what was held jointly by several members of the family come to be held in severalty by the same parties. I hold that the attachment does not affect the partition.

*Point No. 2.*

Now comes the most important point in the case. In view of the fact that it has been strenuously contended on behalf of the respondents that after the partition decree, or even after the filing of the suit for partition, the father's creditor cannot proceed against what is now the sons' separated share in the property in order to realize simple debts against the father already existing and payable by the father at the date of the institution of the suit for partition, I

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propose to discuss the point at some length. Personally speaking, the contention of the respondents would seem to me to be very startling indeed. But for the fact that a contrary view has been taken sometimes, I should have thought that the point was not even open to argument.

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The position is this. In a Mitakshara joint family consisting of the father and sons, the father may, "by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt." See *Brij Narain v. Mangal Prasad* (1). Their Lordships of the Privy Council have, from time to time, pointed out that this is the rule, although there are two conflicting principles recognized by the Mitakshara law. One is that the joint family property is meant for the support of the entire family, and except in the case of distress a single member, even the father, cannot dispose of it. The second principle is that it is the pious duty of a son to pay his father's debts, not tainted with immorality. The strict rule of Mitakshara law would make the son even personally liable to pay the father's debt where there was no family property out of which it might come. The Anglo-Indian courts have put a restriction to this extreme tenet of law, by laying down (in the case of Bombay there was a recourse to legislation) that the liability exists only so far as the son's share in the joint family property would go and not beyond that. If we just ponder over the reason why the law-givers of old countenanced the two apparently contradictory propositions, the reason would be entirely clear. It is true that the family property is the means of the support of the family and must not be lightly handled

(1) (1923) I.L.R., 46 All., 95 (104).

by any one of the members of the family. On the other hand, the father of the family, in order that the family might live, must have credit in the market. Otherwise, everybody with whom the family has to deal would know that any loan granted to the family could not be recovered without perhaps the strictest proof that the loan was required for the purposes of the family. The father had to be trusted; otherwise the sons could not be brought up. Credit, therefore, was given to the father by making it a rule that not only the father shall pay the debt, but so shall the sons. It was believed to be a disgrace that a man should contract a debt and he should die without having made that good. The result was that even the sons and grandsons were called upon to pay the debt of the father and grandfather. The Bengal school of law has improved on this position and have made the father, even where the property is entirely ancestral, the full master of the entire property in his life-time.

The Mitakshara law, therefore, being what it is (as quoted above from the latest Privy Council case on the point), the question arises, could the father and sons defeat the substantive right of the creditor to proceed against the family property, by merely agreeing among themselves that from a particular moment they would hold the property in severalty and not jointly? The remedy of the creditor to proceed against the entire family property is not a mere matter of procedure, but it is a *substantive* right. It is on the faith of the joint family property that the creditor lends money, and although he does not take any charge or mortgage he knows that he has some security at least for his money. Otherwise, he would not lend it. It would be disastrous if one fine morning the father and the sons were to tell the creditor that, on the

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previous evening, the father and sons had sat together and had agreed that from the next morning they should become separated members and that, therefore, the creditor could recover his money only from what had been given to the father as his share of the joint family property. If, as is surely the case, for effecting a partition mere volition on the part of the members of the joint family is enough, it is not necessary to go into court for the purpose. In such circumstances, there is the debt of the father which, for all practical purposes, was payable out of the property belonging to the father and the sons and there are the debtors, in the shape of the father and his sons. Simply because the debtors agree that they shall no longer be joint, the debt is gone, so far as the sons' share is concerned, which, in many cases, would be many times the father's share! Can this proposition be sound?

It has, sometimes, been argued that a simple creditor has no charge on the family property and if he be permitted to follow the property, after partition, in the hands of the sons, the courts will virtually be giving the creditor a charge on the property. This argument, in my opinion, with all respect, is entirely fallacious. The family property does not cease to be the family property simply because it has been decided to enjoy it separately by the father and the sons. Only the mode of enjoyment has been changed and not its character or its liability, if any existed. Take the case of a debtor who is not a Hindu governed by the Mitakshara law. He is an unsecured creditor. If he chooses, the debtor may sell away his entire property, leaving nothing out of which the creditor may realize the debt. If such a debtor dies and if the creditor proceeds against his property in the hands of

his son, nobody will ever suggest that the creditor had a charge against the property and he is following up that charge in the hands of the deceased person's son. The result of the doctrine of pious duty of a Mitakshara son to pay his father's debt is, for all practical purposes, the same as to make the father the absolute owner of the property so far as the payment of his personal debts, not tainted with immorality, is concerned.

Let us take, again, this case. A father governed by the Mitakshara law dies while joint with his sons. After the death of the father, the sons divide the family property among themselves. Can it be argued that an unsecured creditor of the father cannot proceed against what was the joint family property in the life-time of the father, simply because the sons have effected a partition? I suppose such an argument will not find favour with anybody. If such be the case, what difference should it make if a partition be effected in the life-time of the father himself?

If a Mitakshara father contracts a debt after separation from his sons, there is no liability in the sons to pay their father's debts. The reason is not the separation of the sons but it is this: The pious duty of the son to pay his father's debts has been limited by Anglo-Hindu law to what is the joint family property of the father and sons. It is this property to which a creditor looks for payment when he lends money to the father. In the case of a separated father, there is no property in the hands of the father other than what is his own, unshared by anybody else. The father cannot sell his son's divided property to pay his own debt contracted after separation. In the circumstances, although the sons may be under a pious obligation to pay the father's debt,

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there being no property jointly held by the father and his sons, the property in the hands of the sons is not liable. The creditor, while lending the money, has looked upon the property in the hands of the separated father alone, to find out how far he could give his debtor credit.

On principle, therefore, it must be held and I do hold that what was joint family property in the hands of the father, at the date of his incurring the last one of the debts in question, may be proceeded against by the appellant, although some of the property is now in the hands of the sons, to realize the decree passed against the father.

As regards authority, almost all the High Courts have taken the same view as mine, though sometimes after some conflict of opinion. In the Madras High Court, for a time, the view of the law was uncertain. The Full Bench case, however, of *Subramania Ayyar v. Sabapathy Aiyar* (1), settled the law so far as that Court was concerned. Three learned Judges as against two others held that "a simple creditor of a father in a joint Hindu family is entitled to recover the debt from the shares of the sons after a *bona fide* partition between the father and the sons." The case of *Jagannatha Rao v. Viswesam* (2), was approved. It follows that this case overrules the earlier cases in which a contrary opinion was enunciated, including the case of *Vinjamampati Peda Venkanna v. Sreenivasa Deekshatulu* (3).

In Bombay the same view was accepted as in the Madras Court: See *Annabhat v. Shivappa* (4). One of the learned Judges quotes from Mitakshara and Narad

(1) (1927) I.L.R., 51 Mad., 361.

(2) (1924) I.L.R., 47 Mad., 621.

(3) (1917) I.L.R., 41 Mad., 136.

(4) (1928) I.L.R., 52 Bom., 376.

certain passages showing that separation is no cure of the liability to pay the father's debt.

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In Calcutta the same view was taken in *Kulada Prasad v. Haripada Chatterjee* (1). In this case there was no separation by partition but by the fact that a member of the family became a convert to Christianity. Such a conversion operates, under the law, as a separation and the question was whether the share of the member thus separated was liable for pre-existing debts of the father. It was held that it was liable.

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In Patna, in *Ram Ghulam v. Nand Kishore* (2), the High Court in a very short judgement following the case in I. L. R., 41 Mad., 136 and another in I. L. R., 22 Mad., 519, which have since been overruled by the case in I. L. R., 51 Mad., 361, held that a creditor of a father could not proceed against the sons' shares after partition to realize a debt which had been incurred by the father before the partition. As this does not appear to be an entirely independent decision by the learned Judges, I do not feel called upon to discuss this case. Its authority is shaken by the fact that the Madras cases on which it relied have been overruled by the Madras High Court itself.

Coming to the cases in our own High Court, we find that in *Sita Ram v. Beni Prasad* (3), a partition took place during the pendency of insolvency proceedings against the father of a joint Hindu family. The sons' share, in spite of the partition, was held to be liable to be taken hold of by the receiver to realize the father's debts. The point at issue was stated to have been "whether a Hindu father is entitled or not to property obtained by his sons on a division

(1) (1912) I.L.R., 40 Cal. 407. (2) (1925) I.L.R., 4 Pat. 469.

(3) (1924) I.L.R., 47 All. 233.

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of joint ancestral property, when he desires to satisfy his debts out of the proceeds of such property." It was held that he (the father) was so entitled and that, therefore, the receiver was right in seizing the sons' share for the purpose of realization of the father's debts. In a later case, however, a contrary view was taken: Vide *Gaya Prasad v. Murlidhar* (1). This case proceeds on the view that the liability of the sons exists only so long as the family remains joint and disappears when the family is divided. ASHWORTH, J., based his opinion on a statement of law contained in Mulla's Hindu Law in the passages quoted by the learned Judge. With all respect for the learned Judge, the statement of law quoted does not bear on the question that was before him and did not purport to consider the case of a separation at a date when simple debts of the father existed. Mulla in his book on Hindu Law (6th edition, 1929, pages 343 and 344) discusses the law as to the sons' liability to pay the father's debt which existed before the partition. He contents himself with pointing out that the Madras, Allahabad (earlier), Bombay and Calcutta cases take the view that the liability of the sons can be enforced even after partition and that the Patna Court held to the contrary on the authority of Madras cases which have since been overruled. Having held that the liability of the son to pay his father's debt continues only so long as he lives jointly with the father, the learned Judge (ASHWORTH, J.) proceeds to consider whether section 53 of the Transfer of Property Act would apply. Section 53 of the Transfer of Property Act had, of course, no application. The other learned Judge hearing the case with him, KENDALL, J., thought that if the appellant's

(1) (1927) I.L.R., 50 All., 137.

contention before them was allowed, it would be tantamount to holding that the personal debt of the father created a charge on the joint family property. With all respect, as I have shown above, there is no question of a charge. The learned Judge purported to follow the case in I.L.R., 41 Mad., 136, already mentioned, and the case in I.L.R., 22 Mad., 519, both of which have been overruled by the Madras Court itself. The case in our High Court was decided on the 17th of May, 1927, and the Madras and Bombay cases were published later; but the Calcutta case and the previous ruling of our own High Court in I. L. R., 47 All., 263, appear not to have been cited before the learned Judges. There being a conflict of opinion in this Court, we may choose which case to follow.

As shown above, this Court in an earlier case, the Calcutta, the Bombay and the Madras High Courts have taken the same view as I am taking, and the Chief Court of Lucknow has taken the same view in *Jageshwar v. Manni Ram* (1).

I hold that the respondents' share, separated by the partition, is liable to be sold in execution of the appellant's decree against the respondents' father Babu Ram.

I would allow the appeal, set aside the decree of the court below and dismiss the suit of the plaintiffs respondents with costs throughout.

NIAMAT-ULLAH, J. :—I agree with the conclusions arrived at by my learned colleague. I am satisfied, for the reasons given by him, that the evidence fails to establish that the debts had been contracted for immoral purposes, as alleged by the plaintiffs respondents. I am, however, not prepared to hold that the partition between the plaintiffs respondents and

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(1) (1927) I.L.R., 2 Luck., 561.

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their father was effected in good faith. The circumstance that the suit for partition was brought by the minor sons, one aged seven years and the other aged 9 months at that time, only four days after the appellant instituted the suit for recovery of money on foot of promissory notes, does not inspire confidence in the *bona fides* of the alleged partition. It is clear to my mind that the suit for partition was brought by the maternal grandfather of the plaintiffs respondents on their behalf in view of the money suit instituted by the appellant, as it was apprehended that the family property would be proceeded against for satisfaction of the decree likely to be passed in his favour. Ordinarily a suit for partition at the instance of minors, especially against their father, is not countenanced by courts. Such "a suit cannot be brought by, or on behalf of, a minor to enforce partition, unless on the ground of malversation or some other circumstances which make it for his interest that his share should be set aside and secured for him. Otherwise he might be thrust out of the family at the very time when he is least able to protect himself. In short, it is in the discretion of the court to grant or refuse a decree for partition at the suit of a minor plaintiff, and the court has to consider in such cases whether a decree for partition would be for the benefit of the minor." (Mayne's Hindu Law, 9th Edition, p. 688). In view of our finding that the debts in question were not contracted for immoral purposes, it cannot be maintained that the separation of the sons was to their interest, unless we assume that they would be enabled thereby to escape their liability to pay their father's debts. The father, who was the only party to the partition suit, did not raise any objection to a partition between him and his infant sons, and an *ex parte* decree defining their rights *inter se* was passed . . . .

No arrangement was made for payment of debts and it could not have been honestly believed that the partition would not defeat or delay the father's creditors. The subsequent events clearly indicate that the so-called partition was the first manœuvre towards the long drawn battle against the father's principal creditor. It is difficult to imagine that the father has been a silent spectator and not a real litigant under cover of his infant sons. For these reasons, I am inclined to think that the partition was not made in good faith, and that it was prompted by a desire to defeat the claims of the creditors to whom the sons were under an obligation to pay, so far as the extent of the family property would enable them to do so.

Cases in which partition has been held to be a bar to the creditors' claim, for the father's debts incurred before the partition, against the sons, expressly lay down that the liability of the sons is not affected by a partition if it was made to defeat or delay the creditors. Apart, therefore, from the question of law, on which there has been difference of opinion, the appellant is entitled to succeed on the ground that the partition not having been made in good faith can be ignored by him. I do not, however, desire to rest my decision on this ground alone, and would proceed to consider the more important question whether, assuming the partition to have been made in good faith, the remedy of the creditors is, in any way, impaired thereby.

An examination of the plaint shows that the plaintiffs questioned the right of the defendant No. 1 to recover what was due to him under the decree obtained by him against the defendant No. 2, the father, and further contended that, in any case, their property could not be seized in execution of a decree

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obtained in a suit to which they (the plaintiffs) were not parties. The latter part of their contention finds some support from certain observations made by learned Judges who otherwise confirmed the right of the creditors to proceed against the interests of the sons after a partition had been effected. I shall consider it separately from the general question of the sons' liability, after partition, for the father's debts incurred before it.

The answer to the main question, one way or the other, must be a corollary from the following well established propositions :—

(a) Under Hindu law, pure and simple, a son is under a pious obligation to pay his father's debts not contracted for illegal or immoral purposes, regardless of the extent of any joint family property or property inherited by him from the father. But the British Indian courts regard this obligation, which is of too far-reaching a character, to be only a moral obligation, and the extent to which it can be enforced in a court of law is limited to the interest which the son acquires by birth or which he inherits from the father: *Masit Ullah v. Damodar Prasad* (1).

(b) "The sons cannot set up their rights, which are to take present vested interests, on their birth, jointly with their father in ancestral estate, against their father's alienation for an antecedent debt or against his creditor's remedy for his debt, if such debt has not been contracted for an immoral purpose . . . . . If the father's debt, not having been contracted for an immoral purpose, is such as to support a sale of the entirety of the joint estate, either he may sell the latter without suit, or the creditor may obtain a sale of it by a suit. But the joint sons, not being

(1) (1926) I.L.R., 48 All., 518. (526).

parties to the execution proceedings or to the sale, are not precluded from having a question as to the nature of the debt tried in a suit of their own; a right which will, however, avail them nothing unless it can be shown that the debt was not such as to justify a sale of the joint estate." : *Nanomi Babuasin v. Modhun Mohun* (1).

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(c) "There is no rule that this result is affected by the question whether the father who contracted the debt is alive or dead." : *Brij Narain v. Mangal Prasad* (2).

(d) Where after the father's death joint family property is divided among sons, the *entire* family property is liable (sections 50, 52 and 53 of the Code of Civil Procedure).

The liability of the sons being established in these terms, it follows that a creditor can proceed against the family property immediately after the liability is incurred. The liability of the sons, in this respect, arises at the same time as the father's. Their liability is co-extensive with that of the father, except that, in their case, it is limited to the interests which they have in the joint family property. It cannot be disputed that, if a creditor is so advised, he may sue the sons alone and obtain a decree for recovery of the father's debts; but in such a case he can proceed only against the interests of the sons in the joint family property. In practice such a course is hardly conceivable, as it can never be expedient for the creditor to sue the sons and leave out the father. A decree obtained against a father alone binds the sons, because they are represented by the father in such a suit. It is, therefore, clear that the liability of the sons, which arises before a partition between them and their

(1) (1885) I.L.R., 13 Cal., 21.

(2) (1923) I.L.R., 46 All., 95 (104).

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father, and the corresponding right of the creditor to recover his money from them to the extent indicated cannot be affected by a partition which the father and sons may choose to make and to which the creditor is not a party. This conclusion has not been accepted by some learned Judges. The opposite view has been forcibly and elaborately put by SRINIVASA AYYANGAR, J., in his dissentient judgement in *Subramania Ayyar v. Sabapathy Aiyar* (1). The reasoning on which it proceeds will appear from the following extracts from his judgement:—

“It has never been to my knowledge suggested that the pious obligation, as it may be, of the son was towards any person other than the father himself. Otherwise, if it should be deemed to be towards the creditor, it is difficult to see what room there is for any piety. The right of the creditor, therefore, is only against the father. If it were against the son also, the general rule should be that the son should also be made a party to the suit itself in every case and a decree obtained, and that no decree obtained merely against the father is capable, as such, of being executed against the interest of the son also in the family property. It seems to me, therefore, that there can be little doubt that the pious obligation of the son is only towards the father. The right of the father corresponding to this obligation on the part of the son is his admitted right to alienate the entire family property, including the son's share, for *bona fide* antecedent debts of his own. Being a power of sale, although only under certain circumstances, it is really in the nature of *property*, and that is how it comes about that in a mere execution of the decree against the father this power of sale is enforced and made available for the satisfaction of the decree.” (P. 384).

“To my mind *Sahu Ram's* case has not been overruled in its entirety by the case of *Brij Narain*, and it must be regarded as having been merely modified to the extent of engrafting the exceptions recognized by their Lordships of

(1) (1927) I.L.R., 51 Mad., 361.

the Judicial Committee on the ground of *stare decisis* . . . .  
The true view would, therefore, seem to be that the pious obligation of the son no doubt arises only after the father's death, but because of that obligation a power of sale has been created in the father, and because of this power of sale it is possible to proceed even during the father's life time against the son's share . . . . As the creditor's rights and remedies have reference to , and are based on, the father's powers of alienation, it would follow that the creditor could have such right only if and so long as the father has such right . . . . On a partition of the family property there is a disruption of the family, and the managership of the father ceases, and with the managership being lost the power is also lost of the father to effect an alienation of the family property not only for purposes of family necessity but also for his own antecedent debts . . . . If, therefore, after partition between the father and the sons, the father lost that power of sale, it must follow that the creditor cannot seek to enforce any rights based on or referable to the existence of such power." (P. 387-8).

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"In other words, it is in full accordance with the principle I have tried to indicate that in all such suits and proceedings the creditor of the father is seeking to exercise no right of his own against the sons, but is only seeking to work out a right of his own debtor, the father." (P. 390).

The essence of this line of argument is that the direct liability of the sons to the creditors arises only after the father's death, and that the liability of the sons during the father's life time is somewhat different, being towards the father and not towards the creditor, who is, however, enabled to treat the father's right to sell the family property for satisfaction of his own debt as a saleable right or property which the creditor avails of for proceeding against the interest of the sons. With great respect, I would point out that the latest Privy Council case, *Brij Narain v. Mangal Prasad* (1), runs counter to the

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theory of the creditor's right in the above proposition. Their Lordships observed :—

“There are, however, some observations in *Sahu Ram Chandar's* case which are not necessary for the judgement but which their Lordships are bound to say that they do not think can be supported. Founding upon them the learned counsel in this case argued in the court below that no liability of the sons based on the pious obligation to pay the father's debt could be made available to the creditor while the father was still alive. Here again, if the point was open, there would be much to be said in favour of a position which seems consonant with common sense, but their Lordships are satisfied that a long train of authorities has settled the question.”

In summarizing their views their Lordships enunciated proposition No. 5 as follows :—

“There is no rule that this result is affected by the question whether the father . . . . . is alive or dead.”

It is thus made clear that the liability of the sons to pay the debt of their father in his life-time is exactly of the same nature as after his death, and no distinction is to be made in consequence of the father being alive or dead. This being so, and it being conceded that after the father's death the liability of the sons is directly to the creditor,—indeed it cannot be otherwise—the liability of the sons in the father's life time cannot be different and must be taken to be towards the creditor. It is almost a truism that if a creditor is entitled to recover his debt from the sons to the extent of their interest in the family property, the sons are liable to him directly to that extent. It follows as a necessary corollary that the sons' liability to the creditor is not affected by partition after the

father's death. There is no conceivable reason why a partition in the father's life-time should make any difference. It seems to me that there is a close analogy between the liability of the heirs of a debtor, not being a Hindu, to pay the debt of the deceased to the extent of the assets in their hands and the liability of a Hindu son to pay his father's debt, with this difference that, in the first case, the liability arises on the death of the ancestor and on receipt of the assets, while in the second it arises in the life-time of the father, the sons having acquired an interest by birth. The reason in both cases is the same, namely, obtaining an interest in property through the ancestor or the father, as the case may be. The liability once incurred cannot be shaken off in either case by subjecting the property to a division among the heirs or sons.

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The view stated above does not imply that the debt is a charge on the family property any more than it is so on the assets of a deceased debtor not being a Hindu. If transferred by the father or by the sons after the partition, it cannot be followed in the hands of transferees just as the property sold by the heir of a debtor, not being a Hindu, cannot be followed by his creditor not having a charge or lien on any property. The share of the sons being determined on partition, the extent of their liability is ascertained and the creditor can hold them liable to that extent, just as in the case of the heirs of a deceased debtor, not being a Hindu, their liability extends to the property inherited by them. In either case there is no charge on the property received on partition or inherited, as the case may be, and if the separated sons or the heirs have validly transferred it, the creditor cannot seize the property in the hands of the transferees

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but can hold the sons or the heirs liable to the extent of the property originally received on partition or by inheritance. To this extent the liability is personal.

The reason why the interests of a son in the joint family property can be sold in execution of a decree obtained against the father alone is not that the father has a right to sell the family property for satisfaction of his own antecedent debts, which right is treated by the creditor as the property of the father, but the decree is binding on the sons as they are deemed to be represented by the father and, therefore, themselves parties to the decree. Their Lordships of the Privy Council held in *Sheo Shankar Ram v. Jaddo Kunwar* (1), that "there seems to be no doubt upon Indian decisions (from which their Lordships see no reason to dissent) that there are occasions, including foreclosure actions, when the managers of joint Hindu families so effectively represent all other members of the family that the family as a whole is bound." If the sons establish in a suit of their own that the debt, for which a decree was obtained against the father, had been incurred for illegal or immoral purposes, the decree will not be one in respect of debts as to which the father could represent the sons. Whether the sons were represented by the father or not depends upon the subject matter of the suit, and if a decree was obtained for what turns out to be a family liability, the sons must be deemed to have been parties to the suit through the father.

As regards the second branch of the question, namely, whether a decree, obtained against a father after disruption of the family, can be executed against the sons, my answer is in the negative. I think the

(1) (1914) I.L.R., 36 All., 333 (386).

creditor must obtain a decree against the sons themselves, if he desires to proceed against that part of the family property which has been allotted to the sons on partition, for satisfaction of the father's pre-partition debts. As already stated, the sons are represented by the father in case of a decree obtained before partition; but the same consideration cannot apply after disruption of the family, when sons are no longer represented by the father in any suit brought by the creditor, any more than they are represented in transactions relating to the property allotted to the sons. But, in the case before us, the suit for recovery of money had been instituted before the partition, and a decree was passed against the father before any decree defining the shares of the father and sons was passed, though the suit for partition was instituted before a decree in the money suit was passed. In a case where 'it is in the discretion of the court to grant or refuse a decree for partition at the suit of a minor plaintiff, the court has to consider in such cases whether a decree for partition would be for the benefit of the minor. It would seem to follow from this that the rule laid down by the Privy Council that the filing of a plaint for partition, or such other clear and unequivocal expression of an intention to become divided, of itself effects a severance of status, is inapplicable to the case of a minor suing by a next friend. It being left to the discretion of a court to say whether there should be a division of the family or not, it is obvious that that discretion cannot be anticipated or coerced by the determination of another person who purports to act on behalf of a minor . . . . But in the case of a minor the mere institution of the suit cannot effect a division in status, for until the suit proceeds to a decree it is uncertain whether the court

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will or will not deem it a proper case in which to allow partition. It would seem to follow also that, where the court decrees a partition at the suit of a minor, the partition will take effect as from the date of the decree." (Mayne's Hindu Law, page 688, 9th Edition). In this view of the matter, the plaintiffs respondents must be deemed to have separated from their father after the appellant obtained his decree, and the debt to which it related not being immoral, the plaintiffs respondents were fully represented by their father, with whom they were joint at the date of the decree, which is accordingly binding on them.

My learned brother has commented on the case law bearing on the question arising in this appeal, and I fully agree with his views. Of the two cases decided by this Court, namely, *Sita Ram v. Beni Prasad* (1), and *Gaya Prasad v. Murlidhar* (2), which take conflicting views as regards the liability of the sons to pay the father's pre-partition debts after disruption of the family, I prefer to follow the former.

For the reasons stated above, I concur with my learned colleague in allowing the appeal, in setting aside the decree of the court below and in dismissing the suit of the plaintiffs respondents with costs throughout.

(1) (1924) I.L.R., 47 All., 263.

(2) (1927) I.L.R., 50 All., 137.

## REVISIONAL CIVIL.

*Before Mr. Justice Mukerji and Mr. Justice Young.*

ABDUL WAHID KHAN (APPLICANT) *v.* RADHA KISHEN  
AND ANOTHER (OPPOSITE PARTIES).\*

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May, 8.

Act No. XIV of 1920 (*Charitable and Religious Trusts Act*),  
section 7—*Application by trustee for permission to sell—*  
*Order directing sale to one of two rival would-be pur-*  
*chasers—Revision—Civil Procedure Code, section 115—*  
*“Case decided”—“Court.”*

A District Judge exercising powers under Act XIV of 1920 acts as a court, which is subordinate to the High Court, and his acts are subject to the revisional jurisdiction of the High Court. When a trustee applies under section 7 of the Act to obtain advice or direction of the District Judge, a “case” is presented for his decision, and the decision amounts to a “case decided” within the meaning of section 115 of the Civil Procedure Code.

The fact that there is no compulsion on the trustee to act in accordance with the advice or direction given by the Judge under section 7 is no ground for the High Court refusing to correct such advice or direction in the exercise of its revisional powers.

Unless the Judge has acted illegally or with material irregularity in the exercise of his jurisdiction the High Court will not interfere in revision to correct a mere error of judgment.

*Balakrishna Udayar v. Vasudeva Ayyar* (1), followed.

Mr. Peary Lal Banerji, for the applicant.

Dr. Kailas Nath Katju and Mr. Shiva Prasad Sinha for the opposite parties.

MUKERJI, J.:—This is an application to revise an order of the District Judge of Moradabad made on the 13th of September, 1927, under the following circumstances. A certain Muhammadan gentleman

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\* Civil Revision No. 288 of 1927.  
(1) (1917) I.L.R., 40 Mad., 793.

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made a *waqf* of his property for the benefit of his descendants, on the 20th of August, 1915. The aforesaid property was subject to heavy encumbrances. The *mutwalli* for the time being, Musammat Jafri, who was the daughter of the dedicator, made an application to the District Judge of Moradabad, seeking his permission to sell a portion of the property of village Lohari Khadar. She had arranged with one Radha Kishen, one of the opposite parties in this case, that a 14 biswa share should be sold to Radha Kishen for the sum of Rs. 13,500. The learned District Judge granted the permission sought. Radha Kishen, as a matter of precaution, made an application to the District Judge, on the 2nd of September, 1927, asking him to take steps to ensure that there was no litigation in future with respect to the property purchased by himself. He said in the petition that the property was *waqf* and people might, thereafter, raise all sorts of objections to the sale. Radha Kishen, therefore, proposed that the District Judge should issue a notification stating that so much property was being sold for so much to such and such person, and calling upon any person who might be interested to do so, to file any objection before the court. The District Judge acceded to this request and a notification was issued. Abdul Wahid Khan, the applicant before this Court, sent in a letter to the District Judge saying that he had heard that the property was being sold and he offered to pay Rs. 16,000 for the 14 biswas share, for the sale of which the District Judge had already granted permission for Rs. 13,500. The learned Judge directed Abdul Wahid Khan to appear before him on the 8th of September, which date he had fixed for the appearance of persons who might be interested in the sale of the property. On that date, as the order sheet shows,

in the presence of Radha Kishen and his counsel and Jafri Begum's counsel, the Judge accepted Abdul Wahid's offer of Rs. 16,000 for the sale of 14 biswas share. The same day, apparently, after Abdul Wahid Khan had left the court, Radha Kishen made an application to the District Judge that without foregoing his right to bring a suit to obtain specific performance of the contract for sale that may exist in his favour, he was offering the sum of Rs. 16,000 for the property. The learned District Judge, in the absence of Abdul Wahid Khan, made the following order: "This is not unreasonable. I have no objection to the sale in favour of Radha Kishen for Rs. 16,000. My only reason for preferring Abdul Wahid was that he was offering a larger sum." Abdul Wahid Khan, having come to know of this later order, presented a petition to the District Judge on the 13th of September, complaining that the order in favour of Radha Kishen had been made *ex parte*, in his absence. He offered, by his petition, to pay Rs. 18,000, the amount being in excess of Radha Kishen's offer by Rs. 2,000. He pointed out that it was to the interest of the *waqf* property that it should fetch as much price as was possible. On the same day the learned Judge passed the order complained of. The learned Judge said that he had accepted Abdul Wahid's offer, because, at the time, his was the highest offer, but as Radha Kishen made the same offer and as there was a "sort of agreement" between the *mutwalli* and Radha Kishen, the learned Judge had agreed that Radha Kishen should make the purchase. The learned Judge refused the application of Abdul Wahid Khan, but made the remark that it was always open to Abdul Wahid to file a suit against the *mutwalli*.

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It is urged on behalf of Abdul Wahid Khan that the learned Judge should not have altered his order of the 8th of September, 1927, in the applicant's favour which had been passed in the presence of all parties and after hearing all parties, and that, in any case, the subsequent offer of Rs. 18,000 made by the applicant should have been accepted.

In answer to this contention on behalf of Abdul Wahid Khan, the learned counsel for the respondents has urged, first, that no revision is competent, the High Court having no power to revise an order of the District Judge passed under the Charitable and Religious Trusts Act (Act XIV of 1920) and secondly that, in any case, the opinion of the District Judge, which was granted under section 7 of the Act, preferring Radha Kishen to Abdul Wahid, was a matter entirely within the discretion of the Judge and that, for that reason, it was not open to correction by the High Court, even if the High Court had the power to interfere.

As regards the first point, I am clearly of opinion that the contention has no force whatsoever. The power to interfere in revision has been granted to the High Court under section 115 of the Civil Procedure Code. The conditions that must exist to enable the High Court to call for the record of any case are these:—(1) There should be a case decided by a court: (2) That court should be subordinate to the High Court: (3) And there should be no appeal allowed by the law.

There can be no doubt that the powers which may be exercised by the District Judge and the acts that he may perform under Act XIV of 1920 are exercised and performed by the Judge as a "court." The section with which we are immediately concerned is

section 7 of the Act. It says that where a trustee wants advice or direction, he might apply to the "court". The word "court" is defined in the Act itself (vide section 2 as amended by Act XLI of 1923) as "the court of the District Judge or any other court empowered in that behalf by the Local Government and includes the High Court in the exercise of its original civil jurisdiction." Thus, the officer whose order is complained of is a court subordinate to the High Court and one of the conditions is thus complied with.

The second condition that is necessary is that there should be a case decided. The Civil Procedure Code does not define the word "case", nor does it say what it means by the word "decided" in section 115. In my opinion the words, "a case decided by a court", mean "a matter which has been disposed of effectually by the court and not merely for the time being". Thus, a purely *ad interim* order or an order that does not effectually dispose of the matter before the court, would not be a "case decided."

As regards the third point, it is conceded that the law does not allow any appeal against an order made or advice given by the District Judge under section 7 of Act XIV of 1920. This is specifically mentioned in section 12 of the Act.

The first two questions of jurisdiction and meaning of the words "case decided" came up for judicial interpretation before their Lordships of the Privy Council in the well known case of *Balakrishna Udayar v. Vasudeva Ayyar* (1). That case arose under Act XX of 1863, the Religious Endowments Act. Section 10 of that Act was the subject matter for the consideration of their Lordships of the Privy Council and

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the question that had to be answered was whether a District Judge could direct the committee of management, who had failed to make an election to the committee within the statutory period, to hold an election for the purpose of filling up a vacancy. The District Judge had declared that the person so elected, under his orders, by the members of the committee should be one of the members of the same. This order was impeached before the High Court and the High Court in the exercise of its revisional jurisdiction under section 115 of the Civil Procedure Code set it aside. Before their Lordships of the Privy Council it was contended that the High Court had no jurisdiction because its revisional power did not extend over the Judge and, further, the matter before the Judge was not "a case decided." Their Lordships of the Privy Council disallowed both these contentions. To start with, their Lordships pointed out that if a civil court should act absolutely and whimsically in the matter of its jurisdiction, and there being no appeal allowed, there would be no remedy if the High Court were not empowered to interfere. Having pointed this out, their Lordships examined the law. Their Lordships examined the provisions of Act XX of 1863 and came to the conclusion that the acts performed by the District Judge were performed by him as a court of law and not merely as a *persona designata*, whose determinations were not to be treated as judgements of a legal tribunal. I have already pointed out that in the case before us the Judge acts as a court of law and, therefore, under section 3 of the Civil Procedure Code the District Judge's court is a court subordinate to the High Court. Thus one of the conditions laid down in section 115 of the Civil Procedure Code exists. On the second question of what was a "case"

decided, their Lordships remarked that there was no definition of the word "case" in the Code. Then they said: "It cannot, in their Lordships' view, be confined to a litigation in which there is a plaintiff who seeks to obtain a particular relief in damages or otherwise, against a defendant who is before the court. It must, they think, include an *ex parte* application such as that made in this case, praying that persons in the position of trustees or officials should perform their trust or discharge their official duties. Their Lordships concur therefore with the High Court in thinking that the matter adjudicated upon was a case within the meaning of section 115 of the Code." It will be noticed that in the opinion of their Lordships of the Privy Council, an *ex parte* application might amount to a case and the disposal of it would, necessarily, be a case decided.

Applying the law laid down by their Lordships of the Privy Council to the case before us, I have no hesitation in saying that when a trustee makes an application to the District Judge to obtain his opinion or advice, a "case" is presented before the District Judge for his "decision". Suppose in such a case the District Judge says "I am overwhelmed with criminal work; let the applicant go to the Government Pleader for advice." Can it be contended for a moment that the High Court will have no power under section 115 of the Civil Procedure Code to direct the District Judge to take up the application and give his advice or opinion to the applicant, on the ground that the District Judge failed to exercise a jurisdiction that was vested in him by law?

I come to the conclusion that the acts of the District Judge under Act XIV of 1920 are open to correction by the High Court under its revisional

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jurisdiction exercisable under section 115 of the Civil Procedure Code.

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On the merits, the question is whether we should interfere and if so, how? At one stage of the argument it was contended on behalf of the respondents by their learned counsel that it was always open to the trustee seeking the District Judge's advice not to follow it and that, therefore, if the High Court substituted its advice in place of the District Judge's advice, the applicant (Jafri Begum) could always refuse to follow the High Court's opinion or advice and, further, that therefore the High Court should not interfere with the District Judge's advice. This, in my opinion, is a very unsound argument. It is true that section 7 of the Charitable and Religious Trusts Act (Act XIV of 1920) does not say what is going to happen in case the applicant decides not to follow the District Judge's advice after seeking it. All that it does say is that a trustee, acting on the advice, shall be deemed to have discharged his duty as such trustee in the matter in respect of which the petition was made. Because the legislature thought that it was not necessary for it to impose a penalty on the trustee, it does not follow that the District Judge should refuse to give his advice or direction or that the High Court, where it finds that the advice is entirely unsuitable, should not substitute its own advice or opinion in the matter. I need hardly point out that I am assuming that the High Court would interfere only in suitable cases and not at random or arbitrarily. A case like this may easily arise: A trustee states his case in the petition and receives advice from the District Judge which is manifestly to the detriment of the trust property. The trustee may take upon himself the responsibility of ignoring that advice

without bringing on himself any charge of committing breach of trust. He may also come up in revision before the High Court and show that the District Judge, in giving the advice, has not really considered the matter at all, has not applied his mind to the case and has thereby, in the exercise of his jurisdiction, acted with material irregularity. The High Court may think it fit to set aside the advice of the District Judge and put the trustee in possession of better advice. In my opinion, it is impossible to say that suitable cases may not arise in which an exercise of the revisional jurisdiction of the High Court might be desirable. It may be pointed out that in framing section 12 of the Act (Act XIV of 1920) the legislature intentionally confined themselves to appeal and said nothing about revision. Section 12 runs as follows:—

“No appeal shall lie from any order passed or against any opinion or advice or direction given under this Act.”

Having regard to the decision of the Privy Council in *I. L. R.*, 40 Mad., 793, quoted above, we cannot take it that the legislature were ignorant of the existence of revisional jurisdiction in the High Court when they framed the section 12. They might have said that neither an appeal nor a revision shall lie. The omission of the word revision confirms my opinion that a revision is not shut out.

Coming to the merits of the case before us, the position seems to be this. Radha Kishen has already obtained a sale deed in his favour from Musammat Jafri. It was executed on the 12th of September, 1927, and registered on the 13th of September, 1927, the latter being the date of Abdul Wahid's application offering Rs. 18,000. I do not approve of the learned

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Judge's preference of Radha Kishen to Abdul Wahid and, in my opinion, Abdul Wahid having offered Rs. 16,000 in the presence of Radha Kishen's counsel, and the learned Judge having accepted the same, it was not open to the Judge to accept the subsequent offer of Radha Kishen of Rs. 16,000. Ordinary business methods should have been followed. There was no question of an agreement being in existence with Radha Kishen, because the entire negotiation was, by consent, to be subject to the Judge's advice and opinion. At the instance of Radha Kishen himself the notification was issued, inviting people to come and offer objections to the proposed sale to Radha Kishen. If Radha Kishen was going to buy the property cheap by paying Rs. 2,500 less than the fair price, it was certainly open to the District Judge to advise Musammat Jafri not to accept that offer, and to advise her to accept Abdul Wahid's for Rs. 16,000. Abdul Wahid's subsequent offer of Rs. 18,000 is of no consequence, coming as it did 5 days later.

The District Judge, no doubt, acted somewhat improperly when he advised Musammat Jafri to accept Radha Kishen's belated offer of Rs. 16,000. But did he act illegally or with material irregularity? As I have said, he was wrong, his advice was not sound. But that does not mean that he exercised his jurisdiction illegally or with material irregularity. He did consider the matter carefully, though I may not be in agreement with him in the result. We cannot correct, in revision, a mere error of judgement. On this ground we cannot interfere.

There is another aspect of the case. Suppose it is a case in which we may interfere under the law. But we are not bound to interfere, unless we think

that we ought to interfere. The question is whether we should undo all the transactions that have already taken place; undo the sale, undo the mutation and undo all that has happened during over the last year and a half, during which, presumably, Radha Kishen has been in possession. The daughter of the dedicator, who is the trustee and presumably the principal beneficiary under the *waqf*, is satisfied with the District Judge's order. We find that none but the intending purchaser Abdul Wahid Khan is interested in questioning the order. In the circumstances I do not think that I should interfere and advise Jafri Begum to cancel the sale in favour of Radha Kishen and to execute a new sale in favour of Abdul Wahid Khan for the same amount as has been paid by Radha Kishen.

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In the result I would dismiss the application, but, under the circumstances, without costs. The order impeached was certainly of doubtful propriety, and the contention of the respondents that the High Court had no revisional jurisdiction has been found to be untenable. I would make the parties pay their own costs of the present application.

YOUNG, J.:—I agree.



## APPELLATE CIVIL.

Before Mr. Justice Sulaiman and Mr. Justice Pullan.

RAM RAJ TEWARI (PLAINTIFF) *v.* SHEORAJ SAITH-WAR AND OTHERS (DEFENDANTS).\*

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May, 1.

Act (Local) No. XI of 1922 (Agra Pre-emption Act), sections 13, 19, and 20—*Rival pre-emptors' suits—Preference inter se—Acquisition of equal rights by all the pre-emptors before the date of the decree—Property to be divided equally between them.*

Two suits to pre-empt the same property were brought, one by *R* and another by *S*. In each suit the rival pre-emptor was impleaded as a *pro forma* defendant. As between *R* and *S*, *R* had a preferential claim. But during the pendency of the suits, which were consolidated, *S* acquired a certain share and became a pre-emptor of the same rank as *R*, so that at the time when the decree came to be passed there was no preference as between them. *He'd*, they were entitled to share the property equally between them, and *R* could not get the whole.

Section 13 of the Agra Pre-emption Act, in laying down that where two or more persons claiming pre-emption are equally entitled to pre-emption the property shall be equally divided between them, uses the present tense and not the past tense. That section can not be interpreted to mean that they must have been equally entitled to pre-emption on the date of the sale deed, the true criterion being whether they were equally entitled on the date of the decree. *Ram Saran Das v. Bhagwat Prasad* (1), applied.

Mr. Peary Lal Banerji, for the appellant.

The respondents were not represented.

SULAIMAN and PULLAN, JJ. :—This is a plaintiff's appeal arising out of a suit for pre-emption. It is connected with Second Appeal No. 753 of 1927, arising out of a rival suit. On the 14th of November, 1924, two sale deeds were executed of shares in khata No. 3 in the

\*Second Appeal No. 698 of 1927, from a decree of Harihar Prasad, Additional Subordinate Judge of Gorakhpur, dated the 8th of January, 1927, modifying a decree of Shiva Harakh Lal, Munsif of Deoria, dated the 27th of March, 1926.

(1) (1928) I. L. R., 51 All. 411.

mahal in favour of strangers. Suit No. 770 was instituted by Sheoraj and others for pre-emption. These plaintiffs were co-sharers in the mahal but not co-sharers in khata No. 3. Subsequently one more suit No. 800 was filed by Ram Raj Tewari to pre-empt the same properties. This plaintiff was a co-sharer in khata No. 3 also. Both these suits were connected and the plaintiffs in one suit were impleaded as *pro forma* defendants in the other suit. Thus at the time when the sale deed were executed, as well as at the time when the suits were filed, Ram Raj Tewari had a preferential right as against Sheoraj and others to pre-empt this property. But during the pendency of these consolidated suits Sheoraj and others acquired a share in khata No. 3 also by virtue of a decree of a civil suit, dated the 26th of February, 1926. On that date they all became equally entitled to pre-empt the property.

The court of first instance passed its decree on the 27th of March, 1926, and held that Ram Raj Tewari had a superior right to pre-empt the entire property in preference to Sheoraj and others. It accordingly gave Ram Raj Tewari a decree for the whole of the property in the first instance. On appeal the learned District Judge has taken a contrary view and has held that the crucial date in such cases is the date of the first court's decree and that inasmuch as on that date all the rival claimants had equal rights there was no preference *inter se*. He has accordingly divided the property equally among all the pre-emptors.

It seems to us that the view taken by the lower appellate court is correct. As has been held by a Full Bench of this Court in the case of *Ram Saran Das v. Bhagwat Prasad* (1) no decree for pre-emption can be passed in favour of any person unless he has a subsisting right of pre-emption at the time of the decree.

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So that if either by loss of his own right or by an acquisition of a right by the defendant the preference is destroyed by the time the decree comes to be passed the plaintiff ceases to be entitled to such a decree. In the present case no doubt all the rival pre-emptors had a subsisting right of pre-emption as against the vendees. But the rival pre-emptors are also impleaded as *pro forma* defendants and no decree for pre-emption can be passed in favour of Ram Raj Tewari unless the court is satisfied that he has a subsisting right to obtain the decree at the date when that decree is to be passed. Inasmuch as Ram Raj Tewari has lost his preference as against Sheoraj and others it seems to us impossible to pass a decree in favour of Ram Raj Tewari for a share as regards which he has no preference compared with Sheoraj and others. Although section 19 does not in express terms apply to the case of rival pre-emptors, the interpretation which has been put upon it and which requires that the right of preference of the plaintiff should subsist till the time of the decree makes this view consistent with the ruling in the Full Bench case.

It may further be pointed out that section 13, which lays down that where two or more persons claiming pre-emption are equally entitled to pre-emption the property shall be equally divided between them, uses a present tense and not a past tense. That section cannot be interpreted to mean that they must have been equally entitled to pre-emption on the date of the sale deed. That the date of the sale deed is not the absolute crucial date in suits for pre-emption is apparent from the provisions of section 20, in which a subsequent acquisition by the purchaser places him on the same footing as the pre-emptor.

Although the case is not free from difficulty we hold that the view taken by the lower appellate court.

is correct. Ram Raj Tewari not having any preferential right as against Sheoraj and others at the time of the decree is only entitled to share the property equally, and not to claim the whole. We therefore dismiss this appeal.

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RAM RAJ  
TEWARI  
v.  
SHEORAJ  
SAITHWAR.

*Before Mr. Justice Sulaiman and Mr. Justice Pullan.*

SAKINA BEGAM AND OTHERS (DEFENDANTS) v. HARNAM SINGH (PLAINTIFF) AND TEJ SINGH (DEFENDANT).\*

1929

May, 3.

*Act (Local) No. XI of 1922 (Agra Pre-emption Act), sections 4 and 11—Superior and Inferior proprietors—"Co-sharers"—Sale of rights of superior proprietor in entire mahal—Not capable of being pre-empted by an inferior proprietor of a share in mahal.*

The entire rights of the superior proprietor in respect of the whole 20 biswas of a village being sold, an inferior proprietor of a share in the 20 biswas sued for pre-emption. In this village the Government revenue was settled with the inferior proprietors, who alone could let out the lands to tenants and collect rents, and who were bound to pay a fixed sum to the superior proprietor as malikana allowance. *Held* that the rights of the superior proprietor and the rights of the body of inferior proprietors were quite different and distinct in character, and the plaintiff was in no sense a co-sharer of the vendor in the right transferred by him.

The vendor could not be called a person entitled as proprietor to a share or part in the mahal as referred to in section 4 of the Agra Pre-emption Act; the mere right to receive malikana allowance was not an interest of a co-sharer in a part of the mahal. The sale was, therefore, not pre-emptible. *Abdul Wahid v. Halima Khatun* (1), applied.

Messrs. *S. Abu Ali* and *Shiam Krishna Dar*, for the appellants.

*Mr. Narain Prasad Asthana*, for the respondents.

\*First Appeal No. 270 of 1927, from a decree of Lakshmi Narain Tandon, Subordinate Judge of Agra, dated the 15th of May, 1926.

(1) (1920) I. L. R., 42 All., 262.



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v.  
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SINGH.

SULAIMAN and PULLAN, JJ.:—This is a defendants' appeal arising out of a suit for pre-emption. The rights and interest of Balbir Singh in mahals called 10 biswa mahal and  $7\frac{1}{2}$  biswa mahal were sold under a sale deed dated the 10th of February, 1925, to Dr. Masha Ullah Khan whose heirs are the appellants before us. Balbir Singh was recorded in the khewat as the superior proprietor (*malik ala*) in respect of the entire 20 biswas. The plaintiff Harnam Singh is recorded as an inferior proprietor (*malik adna*) of a share out of the 20 biswas. The vendee denied the plaintiff's right to sue for pre-emption. The learned Subordinate Judge has held that the plaintiff is a co-sharer and therefore entitled to maintain the suit. He has not separately considered the question whether the interest transferred is pre-emptible.

The constitution of this village is very peculiar but there is no dispute about its characteristic features. The village is divided at least into two mahals called the 10 biswa mahal and the  $7\frac{1}{2}$  biswa mahal. The counsel for the parties admit that the settlement for the payment of Government revenue has been made by the Government with the proprietors called the inferior proprietors, among whom the plaintiff's name appears. But these inferior proprietors are bound to pay not only the Government revenue and the cesses, but also a fixed sum of malikana dues amounting to Rs. 190 to the superior proprietor who is also described as the lambardar.

It is quite clear that Balbir Singh cannot be treated as a co-sharer of the plaintiff Harnam Singh. The rights of Balbir Singh and Harnam Singh were quite different, distinct and independent. Balbir Singh is not a proprietor of "any share or part in a mahal," as referred to in section 4. His rights, whatever they

may be, extended to the entire 20 biswas. He has transferred his entire rights. The present plaintiff is in no sense a co-sharer of Balbir Singh in the right so transferred by him.

Section 4 of the Pre-emption Act defines a co-sharer as any person, other than a petty proprietor, entitled as a proprietor to any share or part in a mahal or a village. Balbir Singh undoubtedly was not a petty proprietor. He cannot be called a person entitled as proprietor to a share or part in this mahal. The Government revenue was not settled with him. Both Balbir Singh and the body of inferior proprietors cannot be called co-sharers in this mahal at one and the same time. The right of Balbir Singh was confined to a realization of the malikana dues from the inferior proprietors who alone could let out the lands to tenants and collect rents. In a somewhat analogous case arising under the old law a Bench of this Court held in the case of *Abdul Wahid v. Halima Khatun* (1) that the right to receive malikana allowance could not be the subject of a suit for pre-emption. On the analogy of that case we hold that the mere right to receive malikana dues is not an interest of a co-sharer in a part of the mahal.

It is therefore quite obvious that the present plaintiff cannot be allowed to pre-empt this interest. The interest transferred is a right in the entire 20 biswas and in that right the plaintiff is not a coparcener. Under section 11 of the Act a right of pre-emption accrues when a co-sharer or a petty proprietor sells any proprietary interest in land forming part of any mahal or village. Thus before a suit for pre-emption can be maintained it is necessary to find that the interest transferred is not only a proprietary interest but also that of a co-sharer or a petty proprietor. This

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is not so in the present case. The sale accordingly is not pre-emptible.

We should not be understood to decide that no right of pre-emption would accrue *inter se* if co-sharers in the inferior proprietary interest were claiming pre-emption on account of a sale of an inferior proprietary right.

We accordingly allow the appeal and setting aside the decree of the court below dismiss the plaintiff's suit with costs in both courts.

*Before Mr. Justice Banerji and Mr. Justice King.*

1929  
May, 3.

LALTA PRASAD (DEFENDANT) v. PURAN LAL  
(PLAINTIFF).\*

*Civil Procedure Code, order II, rule 2 and order XXXIV, rule 14—Mortgage—First suit for interest only—Second suit for principal—Whether suit maintainable.*

In a simple mortgage the condition was that the mortgagor would pay the principal with interest in five years, that the interest was to be paid every six months and that the creditor was entitled to recover the interest by a separate suit. After the principal money had become payable the mortgagee sued for the interest alone, claiming only a personal relief, and the suit was decreed. While the suit was pending the mortgagee filed another suit for recovery of the principal by sale of the mortgaged property. *Held* that the second suit was not barred by order II, rule 2 of the Code of Civil Procedure by reason of the provisions of order XXXIV, rule 14. *Muhammad Hafiz v. Muhammad Zakariya* (1), and *Kishen Narain v. Pala Mal* (2), distinguished. *Indarpal Singh v. Mewa Lal* (3), referred to.

\*Second Appeal No. 1131 of 1926, from a decree of Shankar Lal, Additional Subordinate Judge of Farrukhabad, dated the 19th of March, 1926, confirming a decree of Banwari Lal Mathur, Munsif of Kaimganj, dated the 7th of November, 1925.

(1) (1921) I. L. R., 44 All., 121. (2) (1922) I. L. R., 4 Lah., 32.

(3) (1914) I. L. R., 36 All., 264.

Messrs. *B. Malik* and *H. P.<sup>2</sup> Sen*, for the appellant.

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LALTA  
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v.  
PURAN LAL.

Messrs. *B. E. O'Connor*, *K. O. Carleton* and *Ambika Prasad*, for the respondent.

BANERJI and KING, JJ.:—This is a defendant's appeal in a suit for sale on a mortgage of the 25th of July, 1918. Lalta Prasad defendant mortgaged certain immovable property under a deed of the 25th of July, 1918. The mortgage is a simple mortgage and it provided that the mortgagor will pay the principal with interest in five years, that he will pay interest every six months and that the creditor will be entitled to recover the interest by a separate suit. The mortgage provided that on failure of payment of the principal and interest the mortgagee was entitled to recover the principal and interest from the mortgagor as well as from his other movable and immovable property.

On the 28th of August, 1925, that is after the principal money had become payable, the mortgagee instituted a suit in the court of the Munsif of Kaimganj for recovery of interest only due to him up to the date of suit. The plaintiff claimed a personal relief. After contest that suit was decreed on the 22nd of October, 1925. While that suit was pending the mortgagee instituted the present suit on the 2nd of September, 1925, for the recovery of the principal amount payable under the mortgage.

The defence of Lalta Prasad was that the plaintiff having brought a suit for interest only and having omitted to sue for the principal amount of money due under the mortgage in that suit, the claim was barred under order II, rule 2 of the Code of Civil Procedure. The court of first instance repelled the contention of the defendant and granted a decree to the plaintiff as prayed. The defendant went up in

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appeal to the District Judge of Farrukhabad and his appeal was dismissed.

Defendant has now come up in appeal before us and it is contended by the learned advocate for the appellant that the claim of the plaintiff is barred under order II, rule 2, inasmuch as on the date when the plaintiff instituted his suit for interest only, the whole of the mortgage money being payable, he not having claimed the amount of the principal money, the present suit must be deemed to be barred under order II, rule 2. It is contended by the learned advocate for the appellant that under the Explanation to order II, rule 2 the cause of action in respect of the claim for interest and principal is the same and the plaintiff having relinquished a portion of his claim, or having omitted to sue, he cannot institute a fresh suit in respect of the portion so omitted or relinquished. In support of his contention he has referred to the Explanation to order II, rule 2 and he has further contended that in view of the pronouncement of their Lordships of the Privy Council in the cases of *Muhammad Hafiz v. Muhammad Zakariya* (1) and *Kishen Narain v. Pala Mal* (2), the plaintiff's claim is barred by the provisions of order II, rule 2. It appears to us that what was held in those two cases has no bearing on the facts of this case.

In our opinion the plaintiff's claim is not barred by order II, rule 2 of the Code of Civil Procedure. Order XXXIV, rule 14 is as follows:—"Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and

(1) (1921) I. L. R., 44 All., 121.

(2) (1922) I. L. R., 4 Lah., 32.

he may institute such suit notwithstanding anything contained in order II, rule 2." In our opinion the plaintiff had a right under the terms of the mortgage to recover the interest due on the mortgage from the defendant personally. Plaintiff had not sought in the first suit any relief as against the mortgaged property and under the provisions referred to above the mortgagee was entitled to recover the amount due on the mortgage in spite of the provisions of order II, rule 2. Order XXXIV, rule 14 has been interpreted by this Court in various cases and it has been held that a mortgagee in spite of having sued for a simple money decree in respect of a claim arising under a mortgage was entitled to institute a suit for sale: See *Indarpal Singh v. Mewa Lal* (1). We are therefore of opinion that there is no force in this appeal and we dismiss it.

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PRASAD  
v.  
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### REVISIONAL CRIMINAL.

*Before Mr. Justice Dalal.*

GHAMANDI NATH v. BABU LAL.\*

*Criminal Procedure Code, sections 240, 403—Conviction on one of two charges—Withdrawal of revision application by complainant in respect of the other charge—Operates as acquittal on that charge—Trial for act falling within two sections of the Penal Code—Conviction under one section—Second trial under the other section barred.*

1929  
May, 8.

G was tried for offences under sections 211 and 500 of the Indian Penal Code on the complaint of M that G had made a false report against M and B alleging that they had taken part in a dacoity. G was convicted under section 500 only. M applied in revision to the High Court for a sentence under section 211 also, but withdrew the application. There-

\*Criminal Reference No. 198 of 1929.

(1) (1914) I. L. R., 36 All., 261.

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after *B* filed a complaint against *G* under section 211. On the question whether *G* could be tried again,—

*Held*, that the withdrawal by *M* of his application in revision, with the consent of the High Court, amounted to a withdrawal of the charge under section 211; and according to section 240 of the Criminal Procedure Code, which was applicable to every grade of court and not only the trial court, the withdrawal had the effect of an acquittal on a charge under section 211 and *G* could not be tried again on it.

Also, by reason of the provisions of section 403 (2) of the Criminal Procedure Code, when a separate charge has been framed against a person under any of the sub-sections other than sub-section (1) of section 235, he cannot be tried for the separate charge when he has once been convicted or acquitted of one charge; and in the present case the two separate charges, namely under section 211 and under section 500 of the Indian Penal Code, were framed not under sub-section (1) but under sub-section (2) of section 235. *Sharbekhan v. The Emperor* (1), followed.

Mr. *Shambhu Nath Chaube*, for the applicant.

Mr. *Iqbal Ahmad*, for the opposite party.

DALAL, J. :—One Ghamandi Nath made a report to the police on the 21st of April, 1928, that on the previous night a burglary or dacoity had been committed at his house and that two men, Manni Lal, and Babu Lal, were standing at his door armed with a spear and a sword, directing the operations of the burglars or dacoits. The report was found to be false so far as Manni Lal and Babu Lal were concerned. Ghamandi Nath was thereupon tried for offences under sections 211 and 500 of the Indian Penal Code on the complaint of Manni Lal, who is a brother of Babu Lal. The Magistrate convicted Ghamandi Nath under section 500 and sentenced him to three months' simple imprisonment. He adopted a very weak attitude and refrained from passing any order on the charge

(1) (1905) 10 C. W. N., 518.



under section 211 of the Indian Penal Code. Manni Lal thereupon applied in revision to this Court to enhance the sentence under section 500 of the Indian Penal Code and to inflict a sentence under section 211 of the Indian Penal Code. This Court agreed that the sentence of three months' simple imprisonment was ludicrously inadequate, but as Manni Lal withdrew his application the court refrained from issuing notice to Ghamandi Nath to show cause why the sentence passed on him should not be enhanced. Babu Lal thereupon took up the running and filed in the court of a Magistrate a complaint against Ghamandi Nath under section 211 of the Indian Penal Code, and the Magistrate accepted this complaint. The District Magistrate in revision has submitted the record to this Court for dismissing the complaint. He has taken no legal ground but has expressed the view that further proceedings against Ghamandi Nath would amount to persecution in satisfaction of a private grudge and it was not advisable that he should be further prosecuted. This is a sound reason and I would accept the reference on this ground. It appears to me, however, that in law also the complaint to the Deputy Magistrate is not justified. It was rightly pointed out by Mr. *Chaube* that there was a withdrawal by the complainant, with the consent of the Court here, of a charge under section 211, and so the provisions of section 240 of the Code of Criminal Procedure applied and Ghamandi Nath must be considered to have been acquitted of that charge. It was argued that there was no specific consent of this Court and that the provisions applied only to the trial court. When this Court accepted the withdrawal by the complainant Manni Lal, it may be presumed that it gave its consent to such a withdrawal. In his application for revision Manni Lal had desired a sentence under section 211

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of the Indian Penal Code, also, to be imposed; so his withdrawal of that application amounted to a withdrawal of the charge for that offence. The provisions of section 240 apply to every grade of court, not only to the court of trial. There is also another reason why the complaint to the Deputy Magistrate would conflict with the provisions of section 403, clauses (1) and (2), of the Code. Clause (1) deals with acquittals of offences covered by sections 236 and 237. As to offences covered by section 235, clause (2) lays down: "A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under section 235, sub-section (1)". Reading this in conjunction with the provisions of clause (1), it would follow that when a separate charge has been framed against a person under any of the sub-sections other than sub-section (1) of section 235 he cannot be tried for the separate charge when he has once been convicted or acquitted of one charge. To the case of Ghamandi Nath sub-section (2) of section 235 would apply, because the acts alleged against him of making a false report constitute an offence falling within two definitions of the Indian Penal Code, namely those of section 211 and section 500, and he could be charged with them and tried at one trial for each of such offences. When he was convicted of one of such offences, namely an offence under section 500, he could not be tried over again for an offence under section 211 of the Indian Penal Code. This view is supported by a Bench ruling of the Calcutta High Court, *Sharbekhan v. The Emperor* (1). There a person had been tried for offences under sections 201 and 202 of the Indian Penal Code and acquitted by the Sessions Court. When he was tried again

(1) (1905) 10 C. W. N., 518.

for an offence under section 176 based on the same facts, the High Court held that he could not be so prosecuted as the case did not fall under sub-section (1) of section 235 of the Criminal Procedure Code, but under sub-section (2) of that section.

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GHAMANDI  
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v.  
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I direct, therefore, that the proceedings against the applicant under section 211 of the Indian Penal Code be quashed and Babu Lal's complaint dismissed.

### APPELLATE CIVIL.

*Before Mr. Justice Mukerji and Mr. Justice Young.*

CHANDU MAL (DEFENDANT) v. DARBARI LAL  
(PLAINTIFF).\*

1929  
May, 10.

*Act (Local) No. III of 1901 (Land Revenue Act), sections 175, 233 (1)—Applicable to taxes realizable as land revenue—Income-tax—Sale for realization—Suit for setting aside sale on the ground of fraud.*

Section 233 (1) of the Land Revenue Act covers the case of a sale of immovable property for realization of taxes and dues which are recoverable as if they were arrears of land revenue. Accordingly, a suit to set aside on the ground of fraud a sale of immovable property for the realization of income-tax and irrigation dues is maintainable.

Dr. M. L. Agarwala and Messrs. Kamala Kant Verma and Hanuman Prasad Agarwal, for the appellant.

Messrs. Girdhari Lal Agarwala, Indu Bhushan Banerji and Panna Lal, for the respondents.

MUKERJI and YOUNG, JJ. :—The respondent, Darbari Lal, was assessed with income-tax to the amount of about Rs. 83. He also owed, it appears, a small amount of money on account of irrigation dues. Both

\*Second Appeal No. 89 of 1927, from a decree of J. Allsop, District Judge of Aligarh, dated the 13th of May, 1926, confirming a decree of Piarey Lal, Subordinate Judge of Aligarh, dated the 2nd of January, 1926.

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v.  
DARBARI LAL

the taxes were due for the year 1923. Certain immovable properties of his, namely four shops, were attached and sold to realize the two taxes. They were sold on the 17th of March, 1924, and were purchased by the appellant before us, Lala Chanda Lal *alias* Chandu Mal. Darbari Lal thereupon brought the suit out of which this appeal has arisen to have the sale set aside on the ground that the sale was brought about by means of fraud to which the appellant was a party.

The suit succeeded in the court of first instance and an appeal by the auction-purchaser, Lala Chanda Lal, was dismissed, but on a ground which will be presently stated. The auction-purchaser has now come up in second appeal, and his contention is that the ground on which the learned Judge has dismissed his appeal was untenable and the learned Judge should have tried the question of fraud.

It appears that the learned appellate Judge was of opinion that the sale that was held was a nullity, inasmuch as there was no previous sanction obtained from the Collector and there was no confirmation of the sale by the Commissioner.

The argument on behalf of the appellant is that a revenue sale, or sale for recovery of a tax which may be recovered as if the same were land revenue, cannot be challenged on any ground other than the one laid down in clause (l) of section 233 of the Land Revenue Act of 1901. Clause (l) permits a party to maintain a claim to set aside a sale for arrear of revenue on the ground mentioned in section 175. Apparently, the plaintiff's case was based on section 175. Clause (m) of section 233 shuts out "claims connected with, or arising out of the collection of revenue, or on account of revenue, or on account of a sum which is by this or any other Act realizable as revenue". The language

of this clause (*m*) is very very wide and would shut out any claim for setting aside a sale, made by the plaintiff respondent, on the ground of want of jurisdiction on the part of the revenue authorities.

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v.  
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In the course of the arguments here the question arose whether clause (*l*) would cover the sale of property for recovery of a tax which was other than the land revenue. We should think that it would cover a case like the present. Under the Income-Tax Act, section 46, income-tax may be realized as if it were an arrear of revenue. Similarly, under the Canal and Drainage Act the arrears may be recovered as land revenue. Section 175 of the Land Revenue Act provides an exception in the case of land revenue, and apparently the same rule would apply where any other tax could be realized as land revenue. There seems, therefore, to be no bar to the maintenance of the suit on the ground of fraud as provided in section 175.

In the result we allow the appeal, set aside the decree of the court below and remand the appeal to that court for disposal on the merits.

*Before Mr. Justice Mukerji and Mr. Justice Young.*

ASA RAM AND ANOTHER (PLAINTIFFS) v. KARAM SINGH  
AND OTHERS (DEFENDANTS).\*

1929  
May, 13.

*Hindu law—Sons renewing father's time-barred debt—Liability of sons to the extent of family property—Act No. IX of 1872 (Contract Act), section 25 (3).*

Where a simple money bond was executed by Hindu sons in order to pay off a time-barred debt due from their father, it was held that the bond could be enforced against the sons only to the extent of the family property and not against them personally.

\*Second Appeal No. 443 of 1927, from a decree of J. N. Dikshit, Additional Subordinate Judge of Saharanpur, dated the 15th of November, 1926, reversing a decree of Sheo Narain Vaish, Munsif of Deoband, dated the 15th of December, 1925.

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v.  
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SINGH.

The words, "of which the creditor might have enforced payment", in section 25(3) of the Contract Act do not include a debt which was not payable by the executant of the subsequent promise himself. Section 25 (3) is meant to cover only the case of the person who would be liable to pay the debt but for its being time-barred. The sons were liable only to the extent of the family property. So, if the bond was deemed to come under section 25(3), any agreement by the sons that they would pay personally would not be within it and would be invalid for want of consideration.

Dr. *M. L. Agarwala*, for the appellants.

Mr. *Mohammad Abdul Aziz*, for the respondents.

MUKERJI and YOUNG, JJ. :—This appeal raises a nice question of law. We have, however, no difficulty in deciding it.

The first two defendants executed a simple money bond in favour of the plaintiffs appellants, in consideration of a debt owed by their father, but which had become time-barred at the date of the execution of the bond in suit. The claim failed in the first court, but succeeded in the lower appellate court. The defendant No. 3, who was a minor brother of the other two defendants, and who was not a party to the bond, was exempted from the claim. The learned Subordinate Judge, in decreeing the claim, directed that the amount of the decree should be realized from the two-thirds share of the joint family property which belonged to the first two defendants.

The plaintiffs have come up in second appeal and it is contended that there should have been a personal decree against the first two defendants as the executants of the bond.

Reliance has been placed on section 25 of the Contract Act. It is argued that the defendants Nos. 1 and 2 agreed to pay a time-barred debt and therefore entered into a valid contract with the plaintiffs and,

as they agreed to pay personally, the personal agreement should have been enforced by the court below.

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KARAM  
SINGH.

Section 25 (3) runs as follows:—"An agreement made without consideration is void, unless it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits."

The words, "of which the creditor might have enforced payment", according to the learned counsel for the appellant, would include a debt which is not payable by the executants of the bond themselves. But as we read that sub-section, we think that it is meant to cover only the case of the person who would be liable to pay but for the limitation barring the suit. In this case the bond could be enforced against the sons only to the extent of the joint family property. The sons would not be personally liable at all. That being the case, if the bond in suit did come, as to which we express no opinion, within section 25(3), any agreement as to liability which could not be enforced originally could not be enforced under the new agreement. To make it clear, the sons were liable only to the extent of the family property. If they agreed to pay the father's debt, any agreement that they would pay personally would be without consideration as it would not be within section 25(3).

No authority has been cited on either side. We think that the decree passed by the court below is a just and proper decree and we see no reason to interfere with it, unless some clear authority is produced to induce us to do so. The appeal fails and is hereby dismissed with costs.

Before Mr. Justice Boys and Mr. Justice Young.

1929  
May, 16.

BHAGWAN DAS AND OTHERS (DEFENDANTS) v. ZAMUR-  
RAD HUSAIN AND ANOTHER (PLAINTIFFS).\*

*Privacy—Right of privacy not universal—Local custom to be  
alleged and proved—Nature of relief where easy redress  
available to plaintiff.*

It cannot be assumed that a customary right of privacy exists everywhere in the United Provinces or that every single individual is entitled to rely on such a custom. The plaintiff must allege and prove that a customary right of privacy exists in the particular neighbourhood in which he lives and that he individually or as a member of a particular class is entitled to the benefit of any such custom. *Gokal Prasad v. Radho* (1), doubted.

The custom of privacy, where it exists, should not be carried to an oppressive length, and where there is an easy remedy, e.g., the putting up of *chicks* in his windows, available to a plaintiff, he should not have any relief except by way of damages, at the outside.

Messrs. *Uma Shankar Bajpai* and *Panna Lal*, for the appellants.

Mr. *Mohammad Abdul Aziz*, for the respondents.

BOYS and YOUNG, JJ.:—This is a defendants' appeal arising out of a suit by plaintiffs to have certain windows and doors made by the defendants closed. The plaintiffs and defendants owned houses on the opposite sides of a street. It has been found to be, at its maximum, in the neighbourhood of the houses, 17 feet in width. The locality is the town of Debai, in the district of Bulandshahr.

The plaintiffs' house faced towards the east, the defendants' towards the west. The plaintiffs had a

\*Second Appeal No. 690 of 1926, from a decree of Mirza Nadir Husain, Additional Subordinate Judge of Bulandshahr, dated the 24th of March, 1926, reversing a decree of Brijnandan Lal, Additional Munsif of Khurja, dated the 24th of July, 1925.

(1) (1888) I. L. R. 10 All., 358.

two-storied house, on the first floor, i.e. upper storey, of which the womenfolk of the house are said to, at any rate occasionally, spend their time. The defendants' house was originally a single-storied house, but some three or four years ago they proceeded to rebuild it, and a few months before suit they proceeded to add to it a second storey. It was the plaintiffs' case that prior to the addition of this second storey there had been screen walls on the roof of the defendants' house and that as a result no one from the defendants' house had been able to see into the windows of the plaintiffs' first floor. The plaintiffs complained that by the addition of this second storey to the defendants' house the plaintiffs were aggrieved.

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It appears that those who were responsible for drafting the plaint were a little uncertain as to how to state their grievance. There is a reference more than once to the plaintiffs' right to light and air through the windows to this first floor, which look towards the east. The case was stated that the plaintiffs were obliged to shut these windows, because the defendants had so constructed their house that they were able to look into the first floor room and see the ladies, and that the result of their having to shut the windows was a dearth of light and air. There was, thus, no direct claim to a right of privacy, but an allegation that an infringement of the right of privacy inevitably resulted in the loss of the right to light and air. This is how the plaintiffs stated their case. But the relief prayed for claimed that their right of privacy should be preserved.

The trial court held that there was no substantial inconvenience to the plaintiffs and dismissed the suit. The lower appellate court held that there was such substantial inconvenience and decreed the suit.



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The case came first before Mr. Justice MUKERJI. He referred to the decision of this Court in *Gokal Prasad v. Radho* (1). Of this case he said "it has never been dissented from and thoroughly establishes the proposition that a right of privacy enjoyed by a party is sacred and cannot be interfered with." He continued :—"Mr. Aziz for the respondents (plaintiffs) states that he is not aware whether his client's windows have got shutters. The judgement of the first court mentions them. If they have not got any, they can easily be provided with shutters . . . . The remedy of the invasion of privacy is very easy and lies in the hand of the plaintiff himself, namely, to hang up ordinary *chicks*, if necessary, with thin pieces of cloth attached to a portion of them. This is done everywhere in bungalows occupied by respectable people whether Indians or Europeans, whether observing or not observing the custom of *parda*. In cases where the plaintiff is without remedy, for example where his courtyard is overlooked, the case might be different. The custom of privacy which undoubtedly exists should not be carried to an oppressive length, and where there is a clear remedy available to a plaintiff he should not have anything except by way of damages at the outside. The point is important and I refer the case to a Bench of two Judges." With these remarks we entirely agree. If the plaintiffs were to be held entitled to relief in the circumstances of this case exactly as they claimed, it would mean that the owner of a small house in a growing part of a big city would be entitled unconditionally to hold up for ever and ever the building of any houses in his vicinity. Mr. Abdul Aziz for the plaintiffs was constrained to admit that no such right of privacy could be supported in a business quarter, but was unable to suggest any

test by which it could be determined what should be held to be and what not to be a business quarter, or at what stage it became a business quarter. It is manifest that such a test would be impracticable.

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But for a circumstance which we shall presently state, we might then have felt compelled to reconsider whether the decision in *Gokal Prasad v. Radho* (1), should still retain its full force after nearly half a century has passed, when it is manifest that the force of customs, especially the custom of *parda*, may be very largely varied in the course of so long a period. We have not, however, to reconsider that case now, for there is another fatal defect in the claim of the plaintiffs. Assuming that the decision to which we have referred should still have full force, it cannot amount to more than this, that a customary right of privacy is not unknown in the United Provinces. It could not possibly be suggested that the effect of that decision was that a customary right of privacy exists at every single spot in the United Provinces, or that every single individual in the United Provinces is entitled to rely upon such a custom. The decision in question was passed before the Easements Act, V of 1882, was applied to these Provinces, but there can be little doubt that much of the language used was taken from section 18 of the Easements Act, and more particularly from the illustration (b) to that section. That illustration particularly refers to the existence of a custom in any particular town. The Act has been since applied to these Provinces by Act VIII of 1891, and the present case has undoubtedly to be decided having in view the terms of that Act. The plaintiffs have made no effort of any sort whatever to prove, and have not even alleged, that a customary right of privacy exists in the particular neighbourhood

(1) (1888) I. L. R. 10 All., 358.

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in which the plaintiffs were living, much less have they alleged or attempted to prove that they were individually or as members of their particular class entitled to take advantage of any such custom. Their whole suit, therefore, should have failed at the outset. This is a matter which went to the root of the plaintiffs' case, but it was not, so far as we are able to ascertain, ever taken by the defendants. We think, therefore, that the parties should bear their own costs throughout.

We agree, further, with Mr. Justice MUKERJI that the plaintiffs have not even suggested any reason why they could not adopt the simple expedient of *chicks*.

We allow the appeal and, setting aside the order of the lower appellate court, we restore the decree of the trial court. The parties will bear their own costs throughout.

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*Before Mr. Justice Sulaiman and Mr. Justice Pullan.*

1929  
May, 17.

GOVIND SINGH (PLAINTIFF) v. MANGLU AND OTHERS  
(DEFENDANTS).\*

*Act (Local) No. XI of 1922 (Agra Pre-emption Act), sections 19 and 20—Indefeasible interest—Vendee obtaining before decree a gift from the father of a joint Hindu family—Interest not being indefeasible does not defeat pre-emption.*

A vendee who has, during the pendency of a suit for pre-emption, become a co-sharer by virtue of having acquired an interest in the mahal cannot defeat the claim for pre-emption unless the interest acquired by him is an indefeasible interest.

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\*Second Appeal No. 1178 of 1927, from a decree of Ali Mohammad, Subordinate Judge of Meerut, dated the 14th of March, 1927, reversing a decree of Makhan Lal, Second Additional Munsif of Meerut, dated the 2nd of December, 1926.

A gift to a stranger of joint family property by a Hindu father is *prima facie* invalid, and can not be said to confer an indefeasible interest, in the absence of proof of validating circumstances or of consent by the sons.

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Although the word "indefeasible" cannot be taken in its widest sense so as to exclude transactions which have a possibility of being challenged, for instance on grounds of undue influence, fraud, coercion etc., it undoubtedly means that on the obvious facts the transaction must confer a valid title on the transferee.

*Ram Saran Das v. Bhagwat Prasad* (1), and *Deo Narain Singh v. Ajudhia Prasad* (2), referred to.

Dr. N. C. Vaish, for the appellant.

Mr. Ambika Prasad, for the respondents.

SULAIMAN and PULLAN, JJ. :—This is a plaintiff's appeal arising out of a suit for pre-emption of property transferred under a sale deed dated the 3rd of August, 1925. The suit was instituted on the 1st of July, 1926. During the pendency of the suit the vendees obtained a share in the village from the vendor Sukhdeo under a deed which was ostensibly one of gift and was dated the 3rd of September, 1926. A second suit for pre-emption was instituted to pre-empt the gifted property on the allegation that the transaction was really one of sale. The connected appeal arises out of that suit.

The first court found that the ostensible gift was a colourable transaction, but at the same time it decreed the claim for pre-emption. The appellate court has found that the gift was a transaction of gift and was neither fictitious nor was it a transaction of sale. We are bound by the finding of fact of the lower appellate court. It has dismissed the suit on the ground that the vendee had become a co-sharer on the same footing as the plaintiff by virtue of this gift.

(1) (1928) I. L. R. 51 All., 411. (2) (1927) I. L. R., 49 All., 696.

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In appeal it is contended before us that the gift was made by Sukhdeo of a share in his ancestral property when he had sons alive and was therefore invalid. It is accordingly contended that the defendants have not acquired such title as to enable them to defeat the plaintiff's claim.

In a case where the purchaser has acquired an interest in the mahal prior to the institution of the pre-emption suit it is incumbent on him to establish that he has acquired an indefeasible interest (section 20). The Full Bench in the case of *Ram Saran Das v. Bhagwat Prasad* (1) has held that section 20 does not apply to a case where the gift is taken after the institution of the suit, but that the same result follows by virtue of the provision of section 19, and a purchaser who has become a co-sharer by virtue of a gift taken during the pendency of the suit can successfully resist the plaintiff's claim for pre-emption. In view of this pronouncement it seems to us that such purchaser also must show that he has acquired an indefeasible interest, otherwise an illogical result will follow, viz., that a purchaser who takes a gift before the suit would not be entitled to defeat the claim unless the interest taken is indefeasible, but a purchaser taking a gift during the suit need not show that he has acquired an indefeasible right.

We have therefore to see whether the interest acquired by the purchaser is an indefeasible interest or whether it is defeasible.

Under the Hindu law, with the exception of certain specified cases, a father cannot alienate family property except for legal necessity or in lieu of his antecedent debt. There can be no legal necessity for a gift in favour of a stranger, when no questions of the gift being made to a near relation, or at the time of mar-

(1) (1928) I. L. R. 51 All., 411.

riage, or for the purposes of conferring spiritual benefit, or for religious purposes, arise. Such a transfer is obviously without authority and can be upset as soon as it is challenged. The word "defeasible" has been explained in the case of *Deo Narain Singh v. Ajudhia Prasad* (1) as meaning liable to be defeated and not necessarily that it has already been defeated. A gift by a Hindu father of joint family property when he is not the sole owner of it is *prima facie* invalid and the defendants cannot take advantage of it without showing that it has become valid in consequence of the consent of all the other members of the family and that no such member is a minor. In the absence of such proof the gift must be deemed to have been invalid.

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Although the word "indefeasible" cannot be taken in its widest sense so as to exclude transactions which have a possibility of being challenged, for instance on grounds of undue influence, coercion, fraud etc., it undoubtedly means that on the obvious facts the transaction must confer a valid title on the transferee. This is not the case here.

We would therefore hold that the defendants had not by virtue of this gift acquired an indefeasible interest so as to extinguish the plaintiff's subsisting right of pre-emption at the time of the first court's decree. The first court had found that the donor Sukhdeo had sons who were entitled to this property. This finding was not challenged by the defendants in their grounds of appeal before the District Judge. They are therefore not entitled to have the question of supposed consent of the sons determined by the lower appellate court.

The result therefore is that we allow this appeal and setting aside the decree of the lower appellate court, restore that of the court of first instance with costs.

(1) (1927) I. L. R., 49 All., 696.

*Before Mr. Justice Boys and Mr. Justice Young.*

1929  
May, 17.

PIARE LAL AND OTHERS (PLAINTIFFS) *v.* JHABBA LAL  
(DEFENDANT).\*

*Civil Procedure Code, order I, rule 1—Joinder of plaintiffs—  
Three co-sharers joining in one suit for profits against a  
lambardar—Act (Local) No. II of 1901 (Agra Tenancy  
Act), sections 163 and 164.*

Several co-sharers may, by virtue of order I, rule 1, of the Civil Procedure Code, join as plaintiffs in one suit for profits against a lambardar under section 164 of the Agra Tenancy Act, 1901, inasmuch as the right to relief arises out of the same act, namely the non-distribution of profits by the lambardar on the due date.

*Mr. Peary Lal Banerji*, for the appellants.

*Mr. Panna Lal*, for the respondent.

BOYS and YOUNG, JJ.:—This is a plaintiffs' appeal arising out of a suit for profits under section 164 of the old Tenancy Act brought against the lambardar. Three plaintiffs sued in the one suit, and it is immaterial whether their shares were equal or unequal. The question was raised whether the three plaintiffs could join their separate claims for relief in one suit. They relied primarily upon order I, rule 1. Both courts have repelled their contention and have dismissed the suit. The only question then that we have to decide is whether or no, by the provisions of order I, rule 1, the three plaintiffs were entitled to join together in the one suit. Order I, rule 1 declares that "all persons may be joined in one suit as plaintiffs in whom any right to relief . . . arising out of the same act . . . is alleged to exist, whether jointly, severally or in the alternative, where, if such

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\*Second Appeal No. 700 of 1926, from a decree of R. L. Yorke, District Judge of Bulandshahr, dated the 12th of January, 1926, confirming a decree of Rameshwar Dayal, Assistant Collector, First Class of Bulandshahr, dated the 8th of May, 1925.

persons brought separate suits, any common question of law or fact would arise." It is not necessary to consider the other phrases occurring in the rule. We are satisfied that the plaintiffs' several rights to relief arose out of the same act. By section 163 of the Tenancy Act it is laid down that "in the absence of any determination of the date by the Settlement Officer or of an express agreement among the co-sharers, profits shall be divisible on such dates as the Local Government may by rules made under the Act prescribe." Dates have been prescribed and no question arises in this case in regard to this point. The section itself only says, "shall be divisible," and the phrase is open to the construction that it is not therein laid down that it is the lambardar's duty to proceed to a division of the profits on the date on which they become divisible. It is open to the construction that all that is laid down is that from the date fixed it is open to co-sharers to come and claim their share of the profits. The real meaning, however, of these words, as laying down an express duty on the lambardar is made clear by the rules framed by the Board of Revenue in virtue of their powers under section 234(f) of the Land Revenue Act. The material rule is to be found at paragraph 18(b) of the Circular No. 8-III, sanctioned by the Local Government on the 24th of February, 1902. The rule reads as follows:—"The duties of a lambardar are . . . . (c) to divide at the appointed times such profits as may be divisible among the co-sharers whom he represents." We quote from the most recent edition of the Manual of the Revenue Department for the United Provinces, at page 63. This, in our view, removes the only possible doubt that might have existed as to the effect of section 163. In our opinion, therefore, the lower courts were wrong in dismissing the plaintiffs' suit on the ground that the three plaintiffs

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could not join in the one suit. We set aside the decrees of both courts and direct the trial court to restore the case to its register of pending suits and to proceed with the determination of the case according to law.

### REVISIONAL CRIMINAL.

*Before Mr. Justice Young.*

1929  
 June, 5.

EMPEROR v. MANSA SINGH.\*

*Act No. VIII of 1914 (Motor Vehicles Act), Rules framed by U. P. Government, Rule 32—Motor accident—Duty of reporting at police station.*

In rule 32 of the rules framed by the U. P. Government under the Motor Vehicles Act, 1914, the words "if any person is injured" govern the whole of the clause; the duty of reporting an accident at the nearest police station arises, therefore, only if any person is injured.

The applicant was not represented.

The Assistant Government Advocate (Dr. M. Wali-ullah) for the Crown.

YOUNG, J. :—In this case the only question for the decision of this Court is the proper construction to be put on rule 32 of the rules framed by the United Provinces Government under the Motor Vehicles Act of 1914. The rule runs as follows :—

"On the occurrence of any accident the driver and the person in charge of any motor vehicle concerned in the accident shall, if any person is injured, render to such person all such assistance as may be reasonably necessary, and shall, if there be no police officer present, report the accident without delay at the nearest police station."

There are two possible constructions of this rule, neither of which would offend against the rules of construction or of grammar. The first is that the words

\*Criminal Reference No. 283 of 1929.

"if any person is injured" govern the whole of the rest of the clause. The other construction possible is that on the occurrence of any accident, if there is no police officer present, the driver or person in charge of the motor vehicle shall report the accident without delay at the nearest police station. In my opinion, the first construction is the correct one. I think the words "if any person is injured" govern the whole of the clause. I agree with the learned Magistrate that the second construction he puts upon the clause is a possible one, but where there are two possible constructions it is the duty of the court to use the common sense construction. I think that this rule was made in order to provide for cases where people are injured, and that the other construction would put an impossible burden upon the motoring public, and incidentally have the effect of putting upon the High Court, some time or other, the duty of defining or limiting the use of the word "accident"; otherwise, if the second construction is placed upon this rule, any motorist or any person in charge of a motor vehicle would be under the danger of a fine if he did not report to the police any one of the hundred various things of no importance which might happen to him, but which might very well be defined as an accident. I accept the reference and set aside the conviction and fine. The fine, if paid, shall be refunded.

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T.  
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SINGH.

## APPELLATE CIVIL.

*Before Justice Sir Shah Muhammad Sulaiman and Mr.  
Justice Boys.*

1929  
June, 7.

ANRUP MISIR (PLAINTIFF) v. RAM HARAKH  
(DEFENDANT).\*

*Civil Procedure Code, order XX, rule 14; order XXI, rule 15—  
Pre-emption—Joint decree in favour of two co-plaintiffs—  
Execution of whole decree by one decree-holder—Whole  
money deposited by one without contribution by the  
other—Possession of whole property, delivered to him—  
Suit by the other for half share.*

A and R jointly filed a suit for pre-emption and a joint decree was passed in their favour. R deposited the whole of the pre-emption money, though apparently without any specific allegation that he was doing so solely on his own account, and applied for execution in his own favour and possession was delivered to him of the entire property. A then filed a suit against R for a half share. It was found that A had not contributed anything towards payment of the pre-emption money. No agreement or understanding between A and R was pleaded or proved that R was to make the payment on behalf of both and that the accounts would be adjusted afterwards. It was further found that A was merely a dummy in the pre-emption suit and that R had made him a co-plaintiff merely to prevent him bringing a separate and possibly collusive suit for pre-emption against the vendees. On these facts, *Held*—

*Per* SULAIMAN, J.—The mere passing of a decree for pre-emption does not confer on the plaintiffs any title to the property; it is the payment of the pre-emption money which gives them such title. A co-plaintiff who refuses to pay the pre-emption money within the time specified in the decree cannot be allowed to claim a share in the property if afterwards he is in a position to contribute.

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\*Second Appeal No. 1554 of 1927, from a decree of L. D. Joshi, Additional Subordinate Judge of Azamgarh, dated the 27th of May, 1927, confirming a decree of Hardeo Singh, City Munsif of Azamgarh, dated the 7th of February, 1927.

In order to determine in what proportion the joint plaintiffs are to share the property, the circumstances under which the payment was made must in each case be inquired into. If any one of the co-plaintiffs has really refused to contribute towards the payment of the purchase money and in that way impliedly withdrawn his claim, and the payment of the whole amount is made by the other co-plaintiff, there being no arrangement or understanding about any contribution to be made later on, the whole property ought to go to the latter.

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HARAH.

The deposit of the pre-emption money within the time fixed by the decree is not a proceeding in execution of the decree and, therefore, order XXI, rule 15 of the Civil Procedure Code does not apply to it.

*Per Boys, J.*—It is impossible to hold that the trial court in a pre-emption suit must, when the money is deposited by one of two or more co-plaintiffs, inquire into the question whether the money is deposited on behalf of all the plaintiffs or only on behalf of one.

*Prima facie* the deposit must be taken to be made on behalf and for the benefit of all the decree-holders, unless the application accompanying the tender contains any specific allegation that the plaintiff making the deposit is doing so solely on his own account and claims to reap the whole benefit of the decree.

The principle of order XXI, rule 15 was applicable to the deposit of money in accordance with a pre-emption decree; and the deposit, whether made by the one co-plaintiff out of his own pocket or not, would enure to the benefit of the other co-plaintiff also. The application for delivery of possession was of course an application in execution and order XXI, rule 15 applied to it.

In face of the finding, however, that the present plaintiff was merely a dummy in the pre-emption proceedings, he could not now plead that the deposit made and the possession obtained by the present defendant enured to his benefit.

Mr. Narmadeshwar Prasad Upadhiya, for the appellant.

Mr. Shiva Prasad Sinha, for the respondent.

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SULAIMAN, J. :—This is a plaintiff's appeal arising out of a suit for declaration and possession. The parties to the present suit had jointly instituted a suit for pre-emption and a joint decree was passed in their favour by the trial court. The pre-emption money was deposited in the name of the present defendant Ram Harakh Misir. The present plaintiff Anrup Misir does not appear to have attempted to deposit any money or to apply to the civil court for execution of the decree or for delivery of the property to him. Ram Harakh Misir however applied for execution in his own favour, alleging that the amount had been deposited by him alone. Execution was allowed and the possession was delivered to him of the entire pre-empted property. In spite of an objection raised by Anrup Misir in the revenue court, Ram Harakh Misir succeeded in obtaining mutation of names. Anrup Misir then filed the present suit for a declaration that he had paid half the pre-emption money and asked for possession of the half share. In his plaint he did not offer to pay half the amount in case it was found that he had not paid it, but later on his vakil made a statement in the trial court to that effect.

Both the courts below have found that the plaintiff had not paid a pie to the defendant on account of the pre-emption money as was alleged by him. The first court decreed the suit on payment of half the amount but the appellate court has dismissed it *in toto*.

The main question raised before us on behalf of the appellant is that when a joint decree for pre-emption had been passed in favour of two plaintiffs, the payment by even one of the plaintiffs would enure for the benefit of both the decree-holders and both would be entitled to equal shares in the property,—the defendant at best should recover the half of the amount which the plaintiff did not pay.

In order to answer this question it is necessary to consider the true nature of a pre-emption suit. Several persons may be entitled to pre-empt a sale. They may institute separate suits, each claiming the whole property, and all the suits may be consolidated and their respective rights and priorities be determined, or they may agree to institute a joint suit for pre-emption.

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Sulaiman, J.

Order XX, rule 14 of the Code of Civil Procedure provides the form which a pre-emption decree may take. Where the rival claims to pre-emption have been adjudicated upon, the decree has to specify their respective rights as provided in sub-clause (2). But where the plaintiffs do not ask the court to adjudicate upon their respective rights *inter se*, a joint decree may be passed and if the amount is deposited in compliance with the decree, the defendant has no concern with the way in which the property is to be shared by the plaintiffs.

But I am unable to hold that the mere fact that a joint decree has been passed in favour of all has the necessary result of passing title to all the joint decree-holders even if only one of them pays the amount. Any pre-emptor is at liberty to withdraw at any stage and he may withdraw even after the decree and before the date fixed for payment. The remaining pre-emptor would then have a right to deposit the whole amount and pre-empt the entire property. I cannot see why a co-plaintiff, who has got a joint decree in his favour, should, in spite of a refusal to contribute towards the payment of the purchase-money or even an express desire to withdraw, still be entitled to recover a share of the property on an offer to pay the proportionate amount subsequently. The pre-emption money has got to be paid within the short

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time fixed for its payment. A co-plaintiff who refuses to pay the amount within that time cannot be allowed to claim the property, say after eleven years, if he then is in a position to contribute. It therefore seems to me that the rights of the joint decree-holders as to the shares which they are entitled to in the property on account of the payment of the purchase-money will have to be determined in case a dispute arises. The property cannot be divided among them automatically merely because the decree was a joint one.

This result in my opinion follows from the following considerations. Rule 14 (1) (b) of order XX of the Code of Civil Procedure lays down that the title to the property shall be deemed to have accrued from the date of the payment. It is therefore clear that a mere passing of the decree does not confer on the plaintiffs any title to the property. It is the payment of the pre-emption money which gives them such title. A similar provision is to be found in section 24 of the Agra Pre-emption Act (Act No. XI of 1922) which lays down that a person who has obtained a decree for pre-emption in respect of any property shall acquire no title to have the property until he pays the purchase-money into court in accordance with the pre-emption decree.

That in order to get equal shares in the property, persons equally entitled to pre-emption must pay an equal share of the consideration is clearly laid down in section 13 of the Pre-emption Act. I therefore think that in order to determine in what proportion the joint plaintiffs are to share the property the circumstances under which the payment was made must in each case be inquired into.

If any one of the co-plaintiffs has really refused to contribute towards the payment of the purchase-money and in that way impliedly withdrawn his claim, and

the payment of the whole amount is made by the other co-plaintiff, the whole property ought to go to the latter. On the other hand, the mere fact that the whole amount has been paid by one co-plaintiff would not destroy the right of the other, if there was any understanding between them that the payment would be made on behalf of both and that the accounts would be adjusted afterwards.

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*Sulaiman, J.*

In the course of the argument it was urged that the deposit of the amount in pursuance of the decree was a proceeding in execution, and order XXI, rule 15 applied to it and that the joint decree could not be executed in favour of one decree-holder without protecting the interests of the other. It was therefore contended that the necessary result was that the entire property passed to both the decree-holders. I am unable to accept this contention. The deposit of the pre-emption money within the time fixed by the court is neither a proceeding in execution of the decree nor any step in aid of it. In fact a conditional decree has been passed and it does not become a perfect decree in favour of the plaintiffs for pre-emption of the property until that condition has been fulfilled. In case of its non-fulfilment the decree is really one of dismissal of the suit. DALAL, J., in *Narain Dat Tewari v. Ram Baran* (1), also held that such deposit was not in execution of the decree. I therefore do not think that order XXI, rule 15 applied to the deposit of the purchase-money.

In the present case the court which passed the pre-emption decree ordered the delivery of possession in favour of Ram Harakh Misir apparently without any investigation of the matter. That however does not, in my opinion, preclude the question from being gone into in the present case.

(1) S. A. No. 506 of 1925, decided on the 19th of October, 1927.



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*Sulaman, J.*

Coming to the facts of the present case, the plaintiff alleged that he had actually paid half of the amount of the pre-emption money to the defendant before the deposit was made. On this allegation he cannot possibly say that he had really not paid the amount but there was an understanding between the parties that Ram Harakh should pay the whole and the parties would adjust their accounts afterwards. The defendant in his written statement asserted that the plaintiff had been included for the mere purpose of preventing him from colluding with the vendees and that when the plaintiff was asked at the time of depositing the money he said that he was in debt and could not pay the amount. The lower appellate court has recorded a distinct finding for the defendant's allegation that "the plaintiff was merely a dummy and was associated in the pre-emption suit to make his collusion with the vendees impossible." On this finding there could not possibly have been any intention in the minds of the parties that the plaintiff should have a share in half of the property and the accounts would be settled between them afterwards. The deposit of the whole amount was made by the defendant on his own behalf and in my opinion the plaintiff cannot take advantage of it in order to claim half the property, even though he is now prepared to pay his half share of the pre-emption money.

The suit was rightly dismissed by the lower appellate court.

Boys, J.:—This is a plaintiff's appeal arising out of a suit for a declaration of his right to one-half of certain property and possession thereof. The present suit arises out of an earlier pre-emption suit. The present plaintiff and the present defendant jointly as co-plaintiffs brought suit No. 32 of 1925 against

one Ram Ban for pre-emption on the ground that the so-called deed of gift to him by one Rambaran was in reality a sale, and that they were entitled to pre-empt. The present plaintiff had apparently a superior claim to that of the defendant, if he had chosen to enforce it separately. But the two, the present plaintiff and the present defendant, did in fact bring the suit jointly.

On 20th May, 1925, a decree was passed in the ordinary form contained in order XX, rule 14, paragraph (1), providing for the payment of Rs. 1,075 and the usual 30 days.

On the 28th of May, 1925, the joint decree-holders joined in an application asking for further time as they had appealed in reference to the amount of the consideration money. It is not clear, as we have not the pre-emption record before us, how time was extended, for the only order on the application is "File".

On the 6th of July, 1925, a deposit was made by the present defendant of the full amount of Rs. 1,075.

On the 12th of December, 1925, the present defendant applied for and obtained delivery of possession to him alone, and then applied for mutation. The plaintiff receiving notice of the mutation proceedings objected, but his objection was disallowed on the ground that the defendant was in sole possession, and mutation was effected in favour of the present defendant alone.

Hence the present suit which the plaintiff has brought, asking for a declaration that he has a half share in the property, and further that a decree for possession of half may be passed if he be found to be out of possession; and he brought this suit on the allegation that he had paid to the defendant half of the consideration money of the property before the money was deposited.

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The trial court found against the plaintiff on the allegation of fact, and it further found, but not in very precise terms, that the plaintiff was really a dummy. The words of the trial court are:—"He was joined as a party so that he may not bring a collusive suit for the vendees. This is a good ground. A real vendee generally tries to catch hold of some preferentially entitled person to pre-empt and admit the whole sale consideration, and sometimes cherishes a hope to get the property through some device or another. An anxious pre-emptor therefore not only files a suit but labours hard to bring in his file preferentially entitled persons so that there may not be a collusive action with an adverse effect against the pre-emptor's suit. I, therefore, hold that plaintiff did not pay the amount he alleges and the whole sum was as a matter of fact deposited by Ram Harakh" (the present defendant). On the issue whether the plaintiff was entitled to any relief, the trial court, notwithstanding the finding which I have quoted, held that the plaintiff was entitled to a decree for possession of half on payment of half the purchase-money.

Both parties appealed. The lower appellate court held definitely that the present plaintiff was merely a dummy, and was associated in the pre-emption suit to make his collusion with the vendees impossible. It also found against the plaintiff that he had paid none of the money, and dismissed the plaintiff's appeal, and allowing the defendant's appeal set aside the decree of the trial court and dismissed the plaintiff's suit with costs.

Plaintiff appeals now to this Court against both the decrees of the lower appellate court. The present second appeal No. 1554 of 1927 is against the decree of the lower appellate court in the defendant's appeal to that court.

The plaintiff appellant's contention is that the payment of Rs. 1,075 by the defendant respondent in the pre-emption suit was a payment which, even if made by the defendant, as found by both courts, entirely out of his own pocket, enured equally to the benefit of the plaintiff, and that similarly the application of the 12th of December, 1925, for delivery of possession to the defendant alone must be taken as enuring also to the benefit of the plaintiff.

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If there were no further facts found than these I should be inclined to hold that the plaintiff's appeal must be decreed and the decree of the trial court restored. We have been referred to order XX, rule 14, which provides for the form of the decree in a pre-emption suit. It appears to me to be impossible to hold that the trial court in a pre-emption suit must, when the money is deposited by one of two or more co-plaintiffs, inquire into the question whether the money is deposited on behalf of all the plaintiffs or only on behalf of one.

We have nothing before us to show with what accompanying statements the tender of the money was made. We have not got the accompanying application before us, owing to the absence of the pre-emption record, and so we can only assume that it contained no specific allegation that the defendant was depositing the money solely on his own account and claimed to reap the whole benefit of the decree; and in such circumstances I think that the trial court should and could only assume that the payment is being made for the benefit of all the co-decree-holders.

I need not enter into the question of what action the court should take if the application of the person depositing the money did show that he was claiming to



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deposit solely on his own account and claiming the whole benefit arising from such deposit. It may be that the trial court's proper course would be to refuse to accept the money or to accept it provisionally and issue notice to the other decree-holders. I have not to determine that question in this case.

It is urged for the defendant that the deposit of money in accordance with a pre-emption decree is not part of execution proceedings so as to make order XXI, rule 15, applicable. On the other hand it may reasonably be suggested that in pre-emption proceedings there is one decree and one only, and that they differ from proceedings in a mortgage suit, where there is a preliminary and a final decree, and that any step taken by a decree-holder by virtue of the pre-emption decree to secure his rights is a step in execution. It is difficult to see what it is if it is not a step in execution. The decree stands complete and the decree-holder desires to obtain his rights under it. It is necessary, before he can demand delivery of the property by an application for such delivery, for him to show that he has paid the money. It is difficult to see how an application to be allowed to deposit the money can be regarded as an application in the suit, and if it is not an application in execution then it is difficult to see into what category it will fall. I have already held that *prima facie* a deposit must be taken to be made on behalf of all the decree-holders, and I would further hold that the principle of order XXI, rule 15 is applicable and that this is an additional reason for holding that where there is nothing to show, as in this case, that the person depositing the money was claiming the sole benefit of the rights following upon such deposit to the exclusion of his co-decree-holders, the trial court can, and can only, treat the deposit as made on behalf of all the decree-holders.

Again, if the appellant had secured, as he should have done, the summoning of the pre-emption record, it would almost certainly have been found that the tender of the money had been accompanied by a prayer for the delivery of the property and, if that were so, it would be still more difficult to suggest that it was not a proceeding in execution to which order XXI. rule 15 would directly apply.

So far, then, I would hold that the deposit, whether made by the defendant out of his own pocket or not, enured to the benefit of the plaintiff also.

Similarly I would hold that the application of the 12th of December, 1925, for delivery of possession to the defendant alone was beyond doubt an application in execution, and therefore an application to which order XXI, rule 15 applied. The court did not in fact make any order under sub-rule (2) of rule 15 of order XXI, but I do not think that the plaintiff would be debarred from claiming half the property.

This is, however, in the present case by no means all. Both courts have found, the lower appellate court in the most express terms, that the plaintiff was merely a dummy in the proceedings, induced by the present defendant to join as a co-plaintiff merely in order that he might not be put up by the original vendee to bring a collusive suit which would defeat the present defendant. In face of this finding I have no hesitation in holding that the present plaintiff cannot now plead that the deposit made by the defendant enured to his benefit or that the possession obtained by him in what was undoubtedly execution of the decree enured to his benefit, and the suit of the plaintiff was rightly dismissed.

I would add that, in my opinion, if neither the appellant nor the respondent secures the presence of a

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necessary record for the information of the court hearing an appeal, the one or the other has only himself to blame if the ordinary presumptions are made against him. It is ordinarily too late at the hearing of the appeal to suggest that the hearing should be interrupted and the case adjourned for the record to be sent for. I would dismiss the appeal with costs.

By THE COURT :—The appeal is dismissed with costs.

### REVISIONAL CIVIL.

*Before Justice Sir Shah Muhammad Sulaiman and Mr. Justice Niamat-ullah.*

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June, 11.

BHOLA NATH (DEFENDANT) v. RAGHUNATH DAS  
MITHAN LAL (PLAINTIFF) AND SHANKAR LAL AND  
ANOTHER (DEFENDANTS).\*

*Arbitration—Supersession before award—Revision—Civil Procedure Code, sections 115 and 151—"Case decided"—Inherent power to supersede a reference to arbitration.—Interference not barred by possibility of relief subsequently under section 105(1).*

The word "case" in section 115 of the Civil Procedure Code does not necessarily mean a suit, but can mean a proceeding. If any proceeding in a suit has terminated, it is certainly a case decided within the meaning of section 115 although the suit itself has not been finally disposed of. Where, after a reference to arbitration, an application for supersession is made, the order superseding and terminating the reference amounts to an order deciding a case and is open to revision.

There is no express provision which empowers a court to supersede an arbitration on grounds other than those mentioned in schedule II of the Civil Procedure Code. But there is an inherent jurisdiction in a court to intervene and supersede the arbitration if the case falls under section 151 of the Code, viz., where such an order is urgently necessary for the

\*Civil Revision No. 49 of 1928.



ends of justice and to prevent some irreparable injury to the party, or to prevent the abuse of the process of the court.

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The mere fact that the aggrieved party might have a right to challenge the order of supersession under section 105(1) subsequently, in an appeal from the decree finally passed, does not debar interference at this stage so as to prevent an unnecessary waste of time and of expenses in recording evidence.

Where the court has superseded the reference merely on the ground that one of the parties thereto has an apprehension that he would not be fairly treated, but has not recorded any finding that in its own opinion there was apprehension that justice would not be done and that its immediate intervention was called for, the court has not applied its mind to the extent of its own jurisdiction and has acted, if not actually without jurisdiction, certainly with material irregularity in the exercise of its jurisdiction.

*Buddhu Lal v. Mewa Ram* (1) and *Ram Sarup v. Gaya Prasad* (2), referred to. *Chatarbhui v. Raghubar Dayal* (3), followed.

Mr. *Hazari Lal Kapoor*, for the applicant.

Messrs. *Uma Shankar Bajpai*, *Girdhari Lal Agarwala* and *Kailas Nath Katju* for the opposite parties.

SULAIMAN and NIAMAT-ULLAH, JJ.:—This is an application in revision from an order superseding a reference to arbitration before the award was delivered. The defendants Nos. 1 and 2 applied to the court that the reference should be superseded on the ground that the umpire was related to the plaintiff and that the uncle of the umpire's son-in-law had sued the defendants at Kasganj and the defendants had an apprehension that that fact might influence the mind of the umpire in deciding the case. The learned Munsif after taking evidence came to the conclusion that it was not proved that the umpire was in any way related to the plaintiff, but considered that the defendants Nos. 1 and 2 might very well apprehend that the

(1) (1921) I. L. R., 43 All., 564. (2) (1925) I. L. R., 48 All., 175.

(3) (1914) I. L. R., 36 All., 354.



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umpire would not treat them fairly. He himself did not record any finding that in his own opinion there was an apprehension that justice would not be done and that his immediate intervention was called for. He superseded the reference and fixed a date for the disposal of the suit. The defendant No. 3 has applied in revision from this order and has impleaded the other parties as respondents.

A preliminary objection is taken on behalf of the defendants Nos. 1 and 2 that no revision lies and reliance is placed on the Full Bench case of *Buddhu Lal v. Mewa Ram* (1). In our opinion this objection is not well founded. In the Full Bench case the trial court had recorded its finding on one of the issues relating to the question of jurisdiction. Two learned Judges thought that the word "case" in section 115 was wide enough to include any particular question in issue between the parties to the suit, but two other learned Judges took the view that the expression "case decided" meant "suit decided" and that no revision could lie from an interlocutory order. The fifth Judge, viz. RYVES, J., confined his judgement to the question whether the decision on a single issue by a subordinate court while the suit was still pending in that court was a case decided within the meaning of section 115, and came to the conclusion that it was not. It therefore seems to us that the Full Bench case is an authority only for the proposition that no revision lies from a finding recorded by the trial court on one or more issues out of several that are before it for disposal. There was no majority in favour of the broad proposition that no revision lies from an interlocutory order. We may note that a revision from an order restoring a case has been held by another Full Bench to be open to revision : *Ram Sarup v. Gaya Prasad* (2).

(1) (1921) I. L. R., 43 All., 564.

(2) (1925) I. L. R., 48 All., 175

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It seems to us that the word "case" does not necessarily mean "suit," but can mean a proceeding. If any proceeding in a suit has terminated, it is certainly a case decided within the meaning of section 115 although the suit itself has not been finally disposed of. In the present case there was a reference to arbitration, then there was an application for supersession which has been finally disposed of and the reference has come to an end. That proceeding has terminated and the case is now restored on its original number and is ordered to be disposed of by the court. The order superseding the reference to arbitration, in our opinion, amounts to an order deciding a case, and as no appeal lies from it, it is open to revision.

This was the view taken by a Bench of this Court in the case of *Chatarbhuji v. Raghubar Dayal* (1) in which a revision from an order superseding an arbitration was actually entertained and allowed. We therefore think that there is no force in the preliminary objection.

On the merits we would have no jurisdiction to interfere under section 115 unless the court below acted without jurisdiction or acted with material irregularity in the exercise of its jurisdiction. Schedule II of the Civil Procedure Code provides for several contingencies in which a reference to arbitration may be superseded by the court. We may refer to paragraphs 5, 8 and 15 of that schedule. There is no express provision which empowers a court to supersede an arbitration on grounds other than those mentioned in it. It may, however, be said in favour of the respondents that there is an inherent jurisdiction in a court to intervene and supersede the arbitration if the case falls under section 151 of the Code, viz. where such an order is necessary for the ends of justice or to prevent the abuse of the

(1) (1914) I. L. R., 36 All. 354.

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process of the court. That such an inherent jurisdiction exists has been laid down by the Bombay High Court and by a single Judge of the Patna High Court, and has also been assumed by the learned Judges in the case of *Chatarbhuj v. Raghubar Dayal* (1). But, as pointed out in the latter case, this inherent jurisdiction of the court, if it can be called into play, should be cautiously and sparingly exercised and only when it is obvious that the ends of justice would not be met by requiring the dissatisfied party to wait and see what the award might be and then to assail it on the ground of corruption or misconduct; and the court should be satisfied that the applicant would suffer some irreparable injury if prompt action is not taken (p. 360). The court has not an absolute power and discretion to supersede all references to arbitration. It can intervene only if it is satisfied that the ends of justice urgently require its intervention or that without such intervention there would be an abuse of the process of the court. Beyond that narrow scope the court has no general power of setting aside arbitrations.

The mere fact that the aggrieved party might have a right to challenge this order under section 105, subclause (1), subsequently in an appeal from the decree finally passed, does not debar us from interfering at this stage so as to prevent an unnecessary waste of time of the court in recording evidence and the additional expenses to which the parties would be subjected.

If the court has not applied its mind to the extent of its own jurisdiction and has not recorded any finding that the ends of justice require its intervention or that the process of the court is likely to be abused, but has merely superseded the reference on the

(1) (1914) I. L. R., 36 All., 354.

ground that one of the parties thereto has an apprehension that he would not be fairly treated, the court, if it has not actually acted without jurisdiction, has certainly acted with material irregularity in the exercise of its jurisdiction. The case of *Chatarbhuj* was also very similar to the present case, where the trial court had superseded the reference on the ground that the applicant had lost confidence in the fairness and impartiality of the arbitrator.

If any fraud has been practised on the defendant and knowledge was deliberately concealed from him, or any bias or prejudice is established after the award is delivered, that may be a ground for setting aside the award when objection is taken to it. It is too early to presume that the umpire would act with a prejudice against the defendants merely because an uncle of his son-in-law has sued the defendants.

We accordingly allow this revision, set aside the order of the court below dated the 31st of January, 1928, which superseded the arbitration and send the case back to that court with directions to refer the matter again to the arbitrators in pursuance of the agreement entered into by the parties. The applicant should have the costs of this proceeding from the defendants Nos. 1 and 2.

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*Before Justice Sir Shah Muhammad Sulaiman and  
Mr. Justice Niamat-ullah.*

1929  
*June, 13.*

BALBHADDAR PRASAD (DEFENDANT) *v.* BITTO (PLAINTIFF).\*

*Act No. IV of 1882 (Transfer of Property Act), section 83—  
Deposits in favour of two persons—Claim by one to be sole  
mortgagee by survivorship—Court's failure to decide claim  
—Revision.*

Where a deposit of mortgage money was made under section 83 of the Transfer of Property Act in favour of two persons as mortgagees, and one of them claimed to be entitled as sole mortgagee on the allegation that the other, who was his father, must be presumed to be dead as he had not been heard of for seven years, *held* that the court was competent to ascertain who was the mortgagee at the present time, i.e., whether the claimant was alone entitled to withdraw the money; and that in declining to do so the court had failed to exercise a jurisdiction vested in it by law.

Mr. *Shamḍhu Nath Seth*, for the applicant.

The opposite party was not represented.

SULAIMAN and NIAMAT-ULLAH, JJ.:—This is an application in revision from an order, dated the 14th of January, 1928, refusing to allow the applicant to withdraw the money deposited, under section 83 of the Transfer of Property Act, by the mortgagor. The money was deposited in favour of the present applicant and his father on the 16th of October, 1922. An application was made on the 9th of December, 1922, on behalf of the present applicant alone, which was consigned to the record room on the ground that both the mortgagees had not joined. Later on, a fresh application was made by the applicant, alleging that his father had not been heard of for more than seven years, and must be presumed to be dead. The learned judge has considered that he is not competent to make inquiries into the death of the applicant's

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\*Civil Revision No. 120 of 1928.

father, and has thought that without the consent of the mortgagor he cannot order the money to be paid to only one of the mortgagees. In our opinion, the court below has failed to exercise jurisdiction which was vested in it. The amount was deposited to the credit of the two mortgagees; but the court was competent to consider who the mortgagee was at the time when the application was made, that is to say, whether the present applicant was alone entitled to withdraw the money. This may be so, because he is now the sole surviving member of the family, or it may be that he is the *karta* of the Hindu family or otherwise authorized to withdraw the money.

We accordingly set aside the order and send this case back for disposal according to law.

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BITTO.

*Before Justice Sir Shah Muhammad Sulaiman and  
Mr. Justice Niamat-ul'ah.*

GARGI DIN (DEFENDANT) v. DEBI CHARAN (PLAINTIFF).\*

*Civil Procedure Code, section 10—Stay of suit—"Matter in issue"—Recurring liability—Suits for rent for successive years.*

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June, 18.

Section 10 of the Civil Procedure Code is not applicable to suits for recovery of rent for successive years; the pendency of an earlier suit for arrears of rent between the parties does not, therefore, bar the court from proceeding with a later suit for rent of subsequent years.

The mere fact that one issue is common in the two suits would not necessitate the stay of the subsequent suit. Although the words "matter in issue" cannot be held necessarily to mean the subject-matter in dispute, they must clearly mean the entire matter in controversy and not one of several issues in the case.

Messrs. Peary Lal Banerji and Shabd Saran, for the applicant.

\*Civil Revision No. 194 of 1928.

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Mr. Narain Prasad Asthana, for the opposite party.

SULAIMAN and NIAMAT-ULLAH, JJ. :—This is an application in revision from an order of the District Judge, Cawnpore, remanding a revenue appeal.

The respondent, Debi Charan, first instituted a suit for arrears of rent based on a registered *qabuliyat*, executed by the applicant. The suit was resisted on the ground that the *qabuliyat* was fictitious, that in respect of a sale deed executed by the present applicant he still remained the proprietor of the land and that there was no relation between the parties of a landholder and a tenant. The revenue court ordered that the present applicant, who was a defendant to that suit, should, under section 199 of the Tenancy Act, establish his title in a civil court. Accordingly, he filed a suit for declaration, which was dismissed by the civil court, and an appeal from that decree is still pending in this High Court and is numbered as First Appeal No. 569 of 1926. In the mean time the revenue court decreed the claim for arrears of rent, on the basis of the judgement of the subordinate civil court, *ex parte*, but later on the *ex parte* proceedings were set aside and the suit restored, and is still pending. As limitation was expiring, the present respondent filed another suit for arrears of rent for subsequent years. The defendant *inter alia* took the plea that the second suit should be stayed, and also raised the question of proprietary title. The revenue court decreed this claim, holding that the question of proprietary title had already been decided.

On appeal to the District Judge, he remanded this case with directions that the lower court should proceed in accordance with section 271, sub-clause (2) of the new Agra Tenancy Act.

On behalf of the applicant it is contended that section 10 of the Code of Civil Procedure applied to this case and the lower court was bound to stay the proceedings. We do not think that this contention can prevail. Under section 12 of the old Code, which corresponds to the present section 10, it was clearly held by this Court that, unless the subject-matter in the two suits is identical and the reliefs are also the same, that section would be inapplicable: *Balkishan v. Kishan Lal* (1). The words, "for the same relief", have been omitted from the new section, and there are a few other slight alterations; but it is noteworthy that, while section 11 provides that no court shall try any suit *or issue*, etc., section 10 merely says that no court shall proceed with the trial of any suit, etc. It follows that the mere fact that one issue is common in the two suits would not necessitate the stay of the subsequent suit. Although the words "matter in issue" cannot be held necessarily to mean the subject-matter in dispute, it seems clear that they must mean the entire matter in controversy and not one of several issues in the case. Had the intention of the legislature been to widen the scope of section 10 so as to make it co-extensive with section 11, the language employed would have been identical.

That section 10 is limited in its scope has been held by several High Courts, although no case of this Court has been brought to our notice. We may in this connection mention *Bepin Behari v. Jogendra Chandra* (2), *Maharaja Kesho Prasad Singh v. Shiva Saran Lall* (3) and *Narikkote Kunnamangalath v. Pothera Kalloor* (4).

We, therefore, think that the learned Subordinate Judge was right in his conclusion that section 10 did not apply to the present case. In these circumstances, he

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(1) (1888) I. L. R., 11 All., 148.

(2) (1916) 24 C. L. J., 514.

(3) (1919) 4 Pat. L. J., 557.

(4) (1924) 48 M. L. J., 251.



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has rightly directed the trial court to proceed in accordance with section 271, sub-clause (2).

Although it is by no means obligatory on the subordinate court to stay the suit, it is entirely a matter of discretion whether or not to adjourn the hearing for a reasonable time and await the decision of the final court of appeal in order to prevent the same evidence being recorded over again.

The application is dismissed with costs.

*Before Justice Sir Shah Muhammad Sulaiman and  
Mr. Justice Niamat-ullah.*

1929  
June, 14.

JAGDEO SINGH AND OTHERS (DEFENDANTS) v. KESHO PRASAD SINGH (PLAINTIFF).\*

*Act (Local) No. III of 1926 (Agra Tenancy Act), section 253—Revision by High Court—"Subordinate revenue court" does not include District Judge—High Court can not revise orders of District Judge—Civil Procedure Code, section 115 not applicable.*

The High Court has no power of revision, in matters under the Agra Tenancy Act, except under section 253 of that Act; the provisions of section 115 of the Civil Procedure Code are not applicable.

The expression "subordinate revenue court" in section 253 means only a first revenue court of original jurisdiction and does not include the court of a District Judge hearing an appeal from the former court. Therefore, the High Court has not got any power of revision over orders passed by the District Judge, however *ultra vires* or illegal they may be; but if the order passed by the trial court be open to objection it may be revised.

Mr. Ambika Prasad Pandey, for the applicants.

Mr. Haribans Sahai, for the opposite party.

SULAIMAN and NIAMAT-ULLAH, JJ.:—This is an application in revision from an order passed by the District Judge on the 11th of February, 1928, remanding

\*Civil Revision No. 144 of 1928.

a case to the Assistant Collector with directions to retry it. The Assistant Collector had, on the 2nd of August, 1927, held that the land in respect of which arrears were claimed had by an action of the river been transferred to another pargana and he had no jurisdiction to try the case. He accordingly ordered the plaint to be returned for presentation to the proper court. An appeal was preferred to the District Judge, who held that the revenue court had jurisdiction to try the case. The suit related to years during which the land had not been so transferred. On behalf of the appellant it is contended that no appeal lay to the District Judge, because so far as the question of appeal is concerned the matter was governed by the old Tenancy Act under which no appeal from an order was allowed, but he contends that a revision lies under the new Act.

It was held by a Full Bench of this Court under the old Act that no revision lies from an order of the District Judge hearing the appeal. In the present case it is contended that revision is maintainable under the new Act. If the revision is governed by the new Act it has to be conceded that the case must fulfil the provisions of section 253 before a revision can be entertained. Under section 264 of the new Act only selected provisions of the Code of Civil Procedure are made applicable to cases under this Act and list I of the second schedule clearly excludes the provisions of section 115 of the Civil Procedure Code from the Act. It is thus clear that the High Court has no power of revision except under section 253. This conclusion is further fortified by the language of section 230, under which the exception is confined to "appeal or revision as provided in this Act". Now under section 253 the High Court may call for the record of any case which has been decided by any subordinate revenue court and in which an appeal lies to the court of the District Judge and in which no appeal lies to the High

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Court, if such revenue court appears to have exercised a jurisdiction not vested in it by law or has failed to exercise a jurisdiction so vested or to have acted in the exercise of its jurisdiction with illegality or material irregularity. The question to consider is whether the expression "such subordinate revenue court" means only a first revenue court of original jurisdiction or includes the court of a District Judge. Considering the phraseology of section 253 side by side with that of section 252, there can be no doubt that "such revenue court" does not include the District Judge mentioned therein. Furthermore, any doubt that one may have on this point is made clear by the definition of "revenue court" in section 3, sub-clause (12). That definition is the same as that given in the United Provinces Land Revenue Act of 1901, where under section 4, sub-clause (8), the District Judge would be excluded from its scope. It is thus clear that, however unfortunate the result may be, the High Court has not got any power of revision of orders passed by a District Judge, howsoever *ultra vires*, irregular or illegal they may be. If the order passed by the trial court is open to objection it can be revised.

It is the applicant's case that the order passed by the trial court was perfectly right. We have therefore no power to interfere with the order of the District Judge. The application is accordingly rejected with costs.

*Before Justice Sir Shah Muhammad Sulaiman and  
Mr. Justice Niamat-ullah.*

1928  
June, 14.

MAHADEO PRASAD (JUDGEMENT-DEBTOR) *v.* KHUBI  
RAM (DECREE-HOLDER).\*

*Civil Procedure Code, section 115—Revision of first court decision, although confirmed in appeal and although no ground for revision of appellate court decision.*

If a trial court has acted illegally or with material irregularity in the exercise of its jurisdiction, the High Court has power to interfere in revision, provided that no appeal lies to the High Court. Section 115 does not require that no appeal in the meantime should have been preferred to the court of the District Judge, or that, if an appeal is preferred, it is only the order of the District Judge which can be revised. And, when the record has been sent for, there is no force in the technical objection that the revision is described as one from the appellate order.

Mr. Shiva Dihal Sinha (for whom Mr. B. S. Shastri), for the applicant.

Mr. Surendra Nath Gupta, for the opposite party.

SULAIMAN and NIAMAT-ULLAH, JJ. :—This is a revision by a judgement-debtor, arising out of an auction sale. On the 19th of January, 1928, an objection under order XXI, rule 90 was filed by the judgement-debtor that the decree-holder had dishonestly misled certain bidders by false representation, that fictitious bids were offered and that the property was sold for an inadequate consideration. The learned Munsif took down the evidence of the judgement-debtor on the 25th of January, 1928, and dismissed his objection on the 26th. He did not fix any date for its hearing and issued no notice to the decree-holder and obviously did not allow any opportunity to the judgement-debtor to produce any witnesses in corroboration of his testimony. This, in our opinion, was a material irregularity in the exercise of jurisdiction which might have prejudiced the judgement-debtor.

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\*Civil Revision No. 162 of 1928.

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PRASAD  
v.  
KHUBI RAM.

The judgement-debtor appealed to the District Judge, who dismissed his appeal stating that it seemed that the judgement-debtor made no attempt to establish his suggestion and did not produce any evidence or ask for time to do so, but he conceded that the house seemed to have been sold for rather a low price.

An objection is taken on behalf of the respondent that we have no power to interfere inasmuch as the revision has been filed from an order of the District Judge which does not fall under section 115. As the whole record has been sent for, we do not see any force in the technical objection that the revision is described as one from the appellate order. Nor do we think that the mere fact that the District Judge has declined to interfere in the matter precludes us from curing the irregularity.

Section 115 of the Civil Procedure Code empowers this High Court to call for the record of any case which has been decided by any subordinate court if no appeal lies thereto. This obviously includes a trial court and the appeal referred to therein means an appeal to the High Court. The present case therefore fulfils the conditions required by that section. If therefore a trial court has acted with material irregularity in the exercise of its jurisdiction, or acted illegally, the High Court has power to interfere in revision, provided that no appeal lies to the High Court. The section does not require that no appeal in the meantime should have been preferred to the court of the District Judge, or that, if preferred, it is only the order of the District Judge which can be revised.

We are satisfied that the objection of the judgement-debtor should be disposed of after giving him full opportunity to produce all his evidence. We accordingly allow this revision and setting aside the order of the Munsif,

dated the 26th of January, 1928, send the case back to that court through the District Judge for disposal according to law.

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### REVISIONAL CRIMINAL.

*Before Mr. Justice Dalal.*

EMPEROR v. DULI CHAND.\*

*Criminal Procedure Code, sections 133, 140—Public nuisance—Finding of magistrate—Revision—Civil suit to question absolute order under section 140—Maintainability.*

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June, 24.

A court of revision should not examine the evidence and interfere with a finding of fact of a magistrate that a certain construction was a public nuisance.

Although a conditional order made by a Magistrate under section 133 of the Criminal Procedure Code, cannot, by reason of the second paragraph of that section, be questioned by a civil suit, there is no such bar to the absolute order, made under section 140, being questioned in a civil court.

Dr. Kailas Nath Katju and Mr. Vishwa Mitra, for the applicant.

Messrs. Peary Lal Banerji and Girdhari Lal Agarwala, for the opposite party.

DALAL, J.—Dr. Katju desired to induce the Court to interfere with a finding of fact of the Magistrate that a particular brick-kiln started by the applicant was a public nuisance in the place where it was started. Reference was made to a Bench ruling of this Court, in the case of *Bihari Lal v. James MacLean* (1) to induce me to examine the evidence recorded by the Magistrate and pronounce independently whether the brick-kiln was a nuisance or not. The case cited was a case in second appeal where the provisions of law applicable are different from the provisions applicable to a revision under the

\*Criminal Revision No. 378 of 1929, from an order of Aghor Nath Mukerji, Additional Sessions Judge, of Meerut, dated the 10th of May, 1929.

(1) (1924) I. L. R., 46 All., 297.

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Criminal Procedure Code. It was alleged that once the brick-kiln is stopped Duli Chand will have no remedy in the civil court. If this were really the case I would have been prepared to inquire into the facts. Reference was made to the second paragraph of section 133 of the Code of Criminal Procedure. That prevents the civil court from questioning the order duly made by a Magistrate under section 133 which empowers the Magistrate to pass a conditional order. There is no such bar to the absolute order of a Magistrate being questioned in a civil court. A similar clause does not appear in section 140 which deals with an absolute order. The view I take of proceedings under section 133 is that the procedure adopted by a Magistrate is more or less summary and his decision goes so far as to fix upon the party who must go to the civil court to get a civil dispute decided. In the grounds of revision it was alleged that the provisions of section 139A were ignored by the Magistrate. This plea has been fully answered by the Additional Sessions Judge. Another case, one of the Lahore High Court, *Gokal Chand v. The Crown* (1), quoted by the learned counsel proceeded on entirely different grounds and did not lay down that a court of revision should revise the finding of Magistrates regarding a certain building being a public nuisance. In my opinion no point of law arises here, and this application is dismissed.

(1) (1919) I. L. R. 1 Lah., 133.

## APPELLATE CIVIL.

*Before Justice Sir Shah Muhammad Sulaiman and  
Mr. Justice Boys.*

RAMDIN HAZARI LAL (PLAINTIFF) *v.* MANSARAM  
MURLIDHAR (DEFENDANT).\*

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June, 25.

*Act No. VIII of 1890 (Guardians and Wards Act), sections 27, 30—Powers of certificated guardian—Starting a new speculative business—Contract with guardian beyond his powers is voidable—Wagering contracts—Forward contracts for purchase of goods—Act No. IX of 1872 (Contract Act), sections 30, 64, 65.*

Where the certificated guardian of a minor, who had inherited an ancestral business of trading in cloth and money-lending, started on behalf of the minor an entirely new business of dealings in sugar and entered into forward contracts of a highly speculative character for the sale of sugar, and it was not even alleged that there was any pressure of necessity to do so: *He'd*—

The certificated guardian had no power to start on behalf of the minor a new and speculative business. The powers and duties of a certificated guardian were governed by section 27 and other provisions of the Guardians and Wards Act; and the action of the guardian in question could not be regarded as one for “protection or benefit of the property” within the meaning of that section. The position of a guardian was somewhat analogous to that of a trustee.

A contract entered into with the certificated guardian of a minor, which is beyond the authority of such guardian, is, by analogy with section 30 of the Guardians and Wards Act, a voidable contract and not a void transaction; and, under section 64 of the Contract Act, the party rescinding it must restore any benefit, e.g., earnest money, already received thereunder.

Every forward contract is to some extent speculative, but is not necessarily a wagering contract. The recognized

\*First Appeal No. 102 of 1923, from a decree of Aghor Nath Mukerji, Judge, Small Cause Court, exercising the powers of a Subordinate Judge, of Cawnpore, dated the 25th of November, 1922.



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test to be applied is whether at the time of entering into the contract there was a definite agreement or understanding between the parties that the performance of the contract by delivery of goods was not to be demanded, but that differences in price only should become payable. The mere fact that there was a boom in speculation regarding the particular commodity at about the period of the contract, and that in many cases obligations were being settled by the payment of differences, would not prove that the contract was a wager.

*Sanyasi Charan Mandal v. Krishnadhan Banerji* (1), *Sukdedoss Ramprasad v. Govindoss* (2), *Kong Yee Lone & Co., v. Lowjee Nanjee* (3), *Chinnaswami Reddi v. Krishnaswami Reddi* (4) and *Zinda v. Mt. Roshnai* (5), followed.

Sir *Tej Bahadur Sapru* and Dr. *Kailas Nath Katju*, for the appellant.

Messrs. *Uma Shankar Bajpai* and *Muhammad Abdul Aziz*, for the respondent.

Boys, J. :—This is a plaintiffs' appeal arising out of a suit for damages for breach of contract and the refund of earnest money.

The plaintiffs' case was that they entered into certain contracts with the firm of Mansaram Murlidhar, the defendant, for the purchase of sugar; that they paid the sum of Rs. 11,750 of the total earnest money on seven contracts, and that they received only certain small quantities of sugar on some of the contracts by means, not apparently of actual physical delivery of the sugar, but of delivery orders; that the firm was now owned by Ram-saran, a minor son of Murlidhar, the last original proprietor who died in 1912, the said minor being represented by his certificated guardian Mst. Janki Kunwar; that the contracts were entered into between the 15th of March, 1919, and the 18th of June, 1919; that some of the contracts were actually signed by Ramcharan, a

(1) (1922) I. L. R., 49 Cal., 580. (2) (1927) I. L. R., 51 Mad., 96.

(3) (1901) I. L. R., 29 Cal., 461. (4) (1918) I. L. R., 42 Mad., 36.

(5) A. I. R., 1928 Lah., 250.

minor son-in-law of Mst. Janki Kunwar, the certificated guardian, and that some were signed by a *munib*, Sheolal, and that all the contracts were negotiated by the principal *munib*, Bhawani Shankar.

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The defence began by a total denial of everything and the further case as set up may be broadly stated as follows: that the sugar business was a new business and that as such the certificated guardian had no power to start it; that in fact the certificated guardian never did start it but such acts as were done by Ramcharan, Sheolal and Bhawani Shankar were done without the authority of the proprietors of the firm and were done in their own interest; and, lastly, that the contracts were in any case wagering contracts and as such void, and the plaintiffs could not even ask for the return of their earnest money, supposing the payment of such to have been even proved.

\* \* \* \* \*

The first issue was decided in the plaintiffs' favour, that Ramsaran was the sole proprietor of the defendant firm, and being a minor was properly represented by his mother as certificated guardian and the suit as framed was maintainable. No further contention has arisen before us in regard to this issue.

\* \* \* \* \*

The grounds of appeal and the arguments thereon have raised before us what I think may be reduced to five main questions:—

- (1) Had the certificated guardian power to start these dealings in sugar?
- (2) Were the persons who negotiated and signed the contracts acting on behalf of the firm or acting only on their own behalf?
- (3) Was the earnest money alleged to have been paid actually paid, and if so, can it be held

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to have reached the proprietor of the firm and are the plaintiffs entitled to recover it?

(4) Were the contracts wagering contracts?

(5) To what relief, if any, are the plaintiffs entitled?

*Boys, J.*

The first question may be disposed of briefly. It is beyond dispute, and no suggestion has been made to the contrary, that in the time of the last proprietor, Murlidhar, and for seven years after his death, the business of the defendant firm was confined to dealing in cloth and money dealings, commonly known as "*lenden*", and that the firm did not enter into, nor was its name used to cover, dealings in sugar until the beginning of 1919. It is beyond dispute, therefore, that a new business was started in the beginning of 1919. The absence of any power in a certificated guardian to start such a new business, at any rate without the sanction of the court, is in my view settled by the decision of their Lordships of the Privy Council in *Sanyasi Charan Mandal v. Krishnadhan Banerji* (1). In that case the original owner of the firm died leaving five sons, three of them majors, two of them minors, one of the latter of whom came of age during the proceedings. The father had left two businesses, one dealing with fuel-wood and the other with rice and other articles. The family was governed by the Dayabhaga law. Nilratan, the eldest brother and the *karta* of the family, was appointed guardian of the minors. He started a new business in rice at a new place, Orphanganj. This new business, which also dealt in rice, was found as a fact not to be merely an extension of the ancestral business, but to be a new business. Their Lordships did not themselves discuss the powers of a *karta* or of a certificated guardian to start on behalf of the minors in the family and to incur

(1) (1922) I. L. R., 49 Cal., 560.

responsibility for a new business, but they said at page 568: "The inability of a *karta* to impose on a minor coparcener the risks and liabilities of a new business started by himself is fully discussed by both courts, and their Lordships agreeing with the conclusion at which they have arrived on this point do not deem it necessary to enter on a further discussion of this aspect of the case." Their Lordships do not, therefore, lay down directly any proposition of law in this respect themselves. To ascertain to what propositions they gave their assent it is necessary to refer to the judgement of the High Court at Calcutta, reported in *Krishnadhan Banerji v. Sanyasi Charan Mandal* (1). Their Lordships of the High Court held on the facts of the case that the starting of the Orphanganj business could not be justified on the ground of necessity, assuming that, had there been necessity, that necessity would have been a justification. They further held that the embarking of a new and speculative trade by the *karta* of a family cannot be said to be for the benefit of the estate. These are, as I understand, the judgements, the propositions of law, material to the present case, with which their Lordships of the Privy Council declared their agreement so far as the powers of a *karta* are concerned. I am unable to distinguish the material facts of this case from the material facts of the case I have been considering, in so far as these propositions are concerned. It cannot be seriously contended, in view of the mass of evidence on the record, that the starting of a new sugar business on behalf of the firm of Mansaram Murlidhar was in the nature of a speculation. In the present case we are immediately concerned with the powers of a certificated guardian. Their Lordships of the Calcutta High Court said further that "whatever the powers of a *karta* may be, the powers of a guardian are more limited", and described a guardian as being in

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(1) (1919) 23 C. W. N., 501.

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the position of a trustee. It is true that their Lordships of the Privy Council did not specifically express their agreements with these observations of the High Court at Calcutta, they made no reference to them, but I think it may be taken that the powers of a certificated guardian are in this respect at least not wider than those of a *karta*. I would hold, therefore, that the certificated guardian had not in the present case any power, assuming that she purported to exercise such power, to start a new and speculative business. This, however, may not conclude the matter before us.

The second question that arises is whether Ram-charan and Sheolal in executing, and Bhawani Shankar in negotiating, the contracts were acting on their own behalf under cloak of the name of the firm, or were acting on behalf of the firm and to the knowledge and with the sanction of Mst. Janki Kunwar, even though she had no power to give such sanction. We have had the whole of the evidence laid before us. [After a detailed examination of the evidence the learned Judge arrived at the finding that these three persons were acting on behalf of the firm and with the knowledge and consent of Mst. Janki Kunwar. It was also found that the earnest money was paid to and was received by the firm.]

The fourth question is whether the defendant can show that these were wagering contracts. If he can, the plaintiffs' suit must be dismissed, even though the findings hitherto arrived at might entitle him at least to a recovery of the money paid by him. There can be no question but that the contracts in question were of a speculative nature. But that is not sufficient. I am unable to take this case out of the decision of their Lordships of the Privy Council in *Sukdedoss Ramprasad v. Govindoss* (1). Their Lordships there said, after holding that the mere fact that the contracts were of a highly

(1) (1927) I. L. R., 51 Mad., 96.

speculative nature was insufficient in itself to render them void as wagering contracts,—“The authorities cited show that to produce that result there must be proof that the contracts were entered into upon the terms that the performance of the contracts should not be demanded, but that differences only should become payable. Now, in the present case no such definite agreement or understanding was proved. . . . The law does not affect to enforce mere courtesies.” In the present case, counsel for the defendants has been unable to refer us to a single line in either the documentary or the oral evidence that points to any agreement when these contracts were made that actual delivery could not be forced upon or demanded by either side respectively. The most that he has been able to show is that there was a boom in sugar speculation at about the period of these contracts and that in many cases obligations were being settled merely by the payment of differences. On the other hand, there is the definite contract proved between the defendants and Begg Sutherland for the actual delivery of 150 bags of sugar. It would be idle for us to speculate on the meaning of this transaction, for on behalf of the defendants no explanation at all is offered. The defence therefore that these were wagering contracts must fail.

The fifth and final question is, to what relief, if any is the plaintiff entitled? On the conclusions which we have hitherto arrived, the plaintiff would *prima facie* at least be entitled to a refund of the money which was received by the firm, even though he may not be entitled to enforce further his contracts or the consequences of the breach thereof. The relevant provisions of the law are to be found in section 64 of the Contract Act and section 30 of the Guardians and Wards Act. We are not dealing here with the case of a contract made with a minor direct, but a contract made with a certificated guardian. We think that by analogy with section 30 of the Guardians

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and Wards Act the contract was clearly not a void contract but was a voidable contract, and under that section the party rescinding the contract must, if he has received any benefit thereunder from the other party to the contract, restore such benefit so far as may be. On behalf of the defendant it has been contended that it would have to be proved that the money received in this case was received not merely by the guardian but by the minor on whose behalf the guardian acted. This is so, but the question whether the benefit reached the minor need not necessarily be proved by direct evidence. It may be established also by inference from the general facts of the case. For the same reasons that we have given in arriving at our conclusion that the money was paid and received to and on behalf of the firm we hold that the inference is justified that it was received by the minor. It is manifest that direct evidence that the money reached the pocket of the minor could not in many cases possibly be available. The minor might and probably would be of such tender age that no such physical transaction would be possible. It would reach the minor by being credited in the books of the firm of which he is proprietor. We need not labour the conclusions to be drawn in this case from the failure to produce the account-books.

We are satisfied therefore that there is no force in the objection that it has not been established that the money if paid, as we have held it to have been paid, reached the proprietor of the firm. We see no reason therefore why the plaintiff should not have the benefit of the provisions of section 64 of the Contract Act. We have further been referred to the cases of *Chinnaswami Reddi v. Krishnaswami Reddi* (1) and *Zinda v. Mt. Roshnai* (2). We hold then that the plaintiff is entitled to recover the earnest money paid.

(1) (1918) I. L. R., 42 Mad., 36. (2) A. I. R., 1928 Lah., 250.

I would set aside the decree of the lower court and give the plaintiff a decree for the sum of Rs. 11,750 with costs, at 6 per cent. interest from the date of suit and dismiss the rest of the claim.

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SULAIMAN, J. :—I concur in the conclusion arrived at by my learned brother and would only like to add a few words.

Admittedly Murlidhar did no other business than in cloth and money-lending. On his death his minor son became the sole proprietor of the business. The sugar transactions were a complete departure from the ancestral trade and the old line of business. They were also transactions of a highly speculative nature. The business of the firm was being carried on, on behalf of the minor, by his mother Mst. Janki Kunwar who was the certificated guardian. I have no hesitation in holding that Mst. Janki Kunwar the guardian had no authority to start an entirely new business of a speculative character. The duties of a certificated guardian are governed by the provisions of section 27 and his powers regulated by the Act. No doubt a guardian may do all acts which are reasonable and proper for the realization, protection and benefit of the property of the minor of which he is appointed a guardian. His position is somewhat analogous to that of a trustee. Ordinary proprietors do sometimes select investments of a speculative character, but it is not open to a trustee or guardian to hazard the money of the minor in the same way. He cannot be allowed to start an entirely new business of a risky character. Such a course, when not compelled by pressure of necessity (e.g. when the ancestral business is about to fail), cannot be regarded as one for the protection or benefit of the property within the meaning of the section. That the powers of a certificated guardian are limited in this way is amply made



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out by the authority of *Sanyasi Charan Mandal v. Krishnadhan Banerji* (1). That was a case under the Dayabhaga law where no question of a *karta* of a joint Hindu family as conceived under the Mitakshara law arose. The person who started the new business was a certificated guardian of the minor. Their Lordships clearly laid down that though a minor may be admitted to the benefit of partnership he cannot be made personally liable for any obligation of the firm, though his share in the property of the firm is liable: section 247 of the Contract Act.

That the transactions in dispute in the present case were of a highly speculative character, depending on the rise and fall of the market price several months afterwards, admits of no doubt. It has not been suggested that there was any pressure at all on the guardian to enter into such transactions. They were accordingly wholly unjustified and unauthorized.

As to the question whether the transactions were of a gambling nature, I agree that the finding of the learned Subordinate Judge must be accepted. The fact that these contracts were of a highly speculative character would be insufficient in itself to render them void as wagering contracts. Every forward contract is to some extent speculative but is not necessarily a gambling one. The recognized test is whether the parties agree that there would not be any demand for the delivery of the goods. In *Kong Yee Lone and Co. v. Lowjee Nanjee* (2), their Lordships of the Privy Council laid down that "if the circumstances are such as to warrant the legal inference that they (parties) never intended any actual transfer of goods at all but only to pay and receive money between one another according as the market price of the goods should vary from the contract price at the given time, that is not a commercial transaction but a wager on the

(1) (1922) I. L. R., 49 Cal., 560. (2) (1901) I. L. R., 29 Cal., 461 (467)

rise or fall of the market." The same principle has been reaffirmed by their Lordships in the recent case of *Sukdedoss Ramprasad v. Govindoss* (1), where it is laid down that to produce the result of a wager there must be proof that the contracts were entered into upon the terms that performance of the contracts should not be demanded, but that differences only should become payable. This later case is further an authority for the proposition that the mere fact that in a particular case no delivery actually took place and differences only were paid on previous occasions would not necessarily show that the contract was a wagering one, if at the time when the contract was originally entered into there was no understanding that delivery would not take place. In the present case there is no satisfactory evidence at all to prove any agreement or understanding between the parties that delivery would not be called for and only differences would be paid.

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There remains the question of the refund of the earnest money paid by the plaintiff. The point was not put forward prominently in the court below.

The defendant who is the proprietor of the firm is a minor and is being sued by the plaintiff. The minor is represented by his guardian for the purposes of this suit. So far as the proceedings relating to the suit are concerned he is not entitled to claim any special privilege or concession on account of his minority. In the conduct of the suit he is bound by the act of his guardian.

\* \* \* \* \*

The only question that remains for disposal is whether the refund of the earnest money paid can be legally ordered. A contract made with a minor direct is undoubtedly void: *Mohori Bibee v. Dharmodas Ghose* (2). It would therefore be difficult to order a refund in such a

(1) (1927) I. L. R., 51 Mad., 96 (101) (2) (1903) I. L. R., 30 Cal., 539.

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case under section 65, unless the case is covered by section 68 also; *Motilal Mansukhram v. Maneklal Dayabhai* (1). But the contracts in the present case were not entered into with the minor himself but with his certificated guardian. If the guardian had no authority to enter into these contracts, the contracts were voidable. They could not be specifically enforced against the minor when the want of authority was established. Even in cases of an alienation of property belonging to the minor made by his guardian the transaction is only voidable under section 30 of the Guardians and Wards Act, and is not absolutely void. By analogy the present transactions were at their very worst voidable.

Section 64 of the Contract Act would therefore be directly applicable and the party rescinding a voidable contract has to restore the benefit already received: *Chinnaswami Reddi v. Krishnaswami Reddi* (2) and *Zinda v. Mt. Roshnai* (3).

There can therefore be no doubt that Rs. 11,750, which were paid as earnest money and have gone into the coffers of the firm on our finding, must be restored.

Unlike section 65, section 64 does not use the word "compensation" but only uses the word "benefit". I do not think that the minor can be called upon, at any rate in this case, to pay interest on the earnest money advanced, but we have power under section 34 of the Civil Procedure Code to award interest *pendente lite* and future.

I would accordingly allow this appeal and grant the plaintiffs a decree only for Rs. 11,750 with interest at six per cent. per annum *pendente lite* and future till realisation.

(1) (1920) I. L. R., 45 Bom., 225. (2) (1918) I. L. R., 42 Mad., 36.  
(3) A. I. R., 1928 Lah., 250

*Before Mr. Justice Sen and Mr. Justice Pullan.*

SHYAM LAL AND OTHERS (DEFENDANTS) *v.*

BADRI PRASAD (PLAINTIFF).\*

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*Hindu law—Joint family property—Alienation by father—  
Legal necessity for part only of sale consideration—Sale  
necessary to raise the money—"Sale itself for legal  
necessity."*

Upon a sale of joint family property by a Hindu father his minor son brought a suit to have it set aside on the ground that the sale was not for legal necessity. As ultimately found, Rs. 525 out of Rs. 1,000, the sale consideration, was for a valid antecedent debt; the remainder was found by the trial court to have been for legal necessity, but the lower appellate court expressed no clear finding about it. *Held*, on appeal—

The main question to be decided in cases of this kind was whether the sale was for legal necessity, that is to say, was there a necessity for the sale of that property. The sum of Rs. 525 had to be raised and the Court was satisfied that it could only be raised by a sale; the point whether the remainder of the sale consideration was or was not found to have been for legal necessity became immaterial. If it was once conceded that the sale was for legal necessity, it was not for the vendee to pursue each and every item of the consideration and ascertain how it was applied. *Sri Krishan Das v. Nathu Ram* (1), *Gauri Shankar v. Jiwan Singh* (2) and *Hunooman Persaud Panday v. Babooee Munraj Koonweree* (3), referred to.

Dr. Kailas Nath Katju, for the appellants.

Mr. Shiam Krishna Dar, for the respondent.

SEN and PULLAN, JJ.—This second appeal arises from a suit brought by a minor son of a Hindu for setting aside a sale of a house and a shop by his father Shankar Lal. It was alleged in the plaint that the father was of bad character and a vagabond who had been spending

\*Second Appeal No. 903 of 1926, from a decree of M. F. P. Herchenroder, Additional District Judge of Agra, dated the 18th of February, 1923, reversing a decree of Y. S. Gahlaut, Munsif of Agra, dated the 11th of September, 1925.

(1) (1926) I. L. R., 49 All., 149. (2) (1928) 25 A. L. J., 987.

(3) (1856) 6 Moo. I. A., 393 (424).

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the income of the property for unlawful purposes. It is also alleged that the sale deed is fictitious and without consideration. It was found by the court of first instance that the sale deed was for Rs. 1,000, of which the consideration is made up of Rs. 525 paid to one Chandmal on account of certain prior mortgages, Rs. 100 paid in advance and Rs. 375 paid before the Sub-Registrar for expenses incurred in connection with certain ceremonies required by the Hindu religion for the plaintiff himself and payment of other oral debts. The first court held that there was overwhelming evidence adduced on behalf of the defendants that the sale deed was executed for legal necessity "which consisted in paying off old debts and expenses for *mundan* ceremony of the plaintiff himself". In appeal the learned Additional District Judge reversed this order, and granted the plaintiff a decree on condition that he paid to the vendees a sum of Rs. 95 within three months. The main question to be decided in a case of this kind is whether the sale was for legal necessity, that is to say, was there a necessity for the sale of this property. In our opinion it was proved without doubt that a sum of Rs. 525 was actually due on the prior mortgages. This must be regarded as an antecedent debt and the learned Judge of the court below was in error when he believed that he could go backwards and find that the only sum due as an antecedent debt was the original sum due on a promissory note prior to the execution of the mortgages. The sum of Rs. 525 had to be raised, and we are satisfied that it could only be raised by a sale. As to the rest of the consideration we have the clear findings of the first court that it was for legal necessity. The lower appellate court finds that the sum of Rs. 375 was actually paid before the Sub-Registrar, but he declines to give a clear finding as to whether it was for legal necessity or not; possibly his finding may be taken to suggest that he thought that there was no

legal necessity, or, at any rate, there was only a necessity for the advance of a smaller sum which he does not specify, but, in our opinion, in view of the recent decisions of the Privy Council this point is irrelevant. If it is once conceded that the sale was for legal necessity, it was not for the vendee to pursue each and every item of the consideration and ascertain how it was applied. We would refer in particular to the decision of their Lordships of the Privy Council in *Sri Krishan Das v. Nathu Ram* (1) and their subsequent decision affirming that ruling and further explaining it in *Gauri Shankar v. Jiwan Singh* (2). These judgements merely interpret what KNIGHT BRUCE, L.J., said in the case of *Hunooman Persaud Panday v. Babooee Munraj Koonwerree* (3): "The purposes for which a loan is wanted are often future as respects the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application". In our opinion the plaintiff failed to establish his case that the sale by his father was not for legal necessity and can be challenged by his minor son. We, therefore, allow this appeal, set aside the decree of the lower appellate court and restore that of the court of first instance with costs throughout.

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(1) (1926) I. L. R., 49 All., 149. (2) (1928) 25 A. L. J., 967.

(3) (1856) 6 Moo. I. A. 393 (424).

*Before Mr. Justice Bennet and Mr. Justice Iqbal Ahmad.*

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*June, 28.*

KANHAIYA LAL (PLAINTIFF) *v.* GIRWAR AND OTHERS  
(DEFENDANTS)\*

*Act No. IX of 1908 (Limitation Act), articles 142 and 144—*

*Suit for possession of immoveable property based on plaintiff's title—Burden of proof—Adverse possession.*

The article of the Limitation Act applicable to a suit in which the plaintiff sues for possession of immoveable property on the basis of his title is article 144, and if in such a suit the plaintiff proves his title he is entitled to a decree, unless the defendant succeeds in establishing his adverse possession for a period of more than twelve years. To cases in which the plaintiff claims relief on the basis of his title article 142 has no application. That article applies to suits in which the plaintiff claims possession of property on the ground that while in possession he was dispossessed or his possession was discontinued by the defendant. In other words that article is restricted to cases in which the relief for possession sought by the plaintiff is based on what may be styled as possessory title.

There may be cases in which the plaintiff sues for possession of immoveable property both on the ground of title and on the ground of his possession having been disturbed by the defendant. In such cases, if he proves his title the burden of establishing title by adverse possession lies upon the defendant, and if the defendant succeeds in proving that fact the suit must fail, otherwise the plaintiff is entitled to a decree. To this extent article 144 will apply to such a suit. But it may be that the plaintiff, though not able to substantiate his title, is in a position to prove his possession and dispossession by the defendant within twelve years. If that be the case, article 142 will apply and the burden will be on the plaintiff. In short, suits for possession based both on the plaintiff's title and possessory title invite the application of articles 142 and 144, according to the varying circumstances of each case.

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Second Appeal No. 904 of 1926, from a decree of Sheodharshan Dayal, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge of Agra, dated the 5th of February, 1926, confirming a decree of Y. S. Gahlaut, Munsif of Agra, dated the 31st of August, 1925.

*Secretary of State for India v. Chellikani Rama Rao* (1),  
*Jai Chand Bahadur v. Girwar Singh* (2) and *Ali Hammad v.*  
*Ghurpattar Singh* (3), followed. *Sita Ram Dube v. Ram*  
*Sundar Prasad* (4) and *Kamakhya Narayan Singh v. Ram*  
*Raksha Singh* (5), distinguished.

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Mr. *Shiam Krishna Dar*, for the appellant.

Mr. *Girdhari Lal Agarwala*, for the respondents.

BENNET and IQBAL AHMAD, JJ.—This appeal must be allowed. It is impossible to contest the proposition that the onus of establishing title by reason of possession for a certain requisite period lies upon the person asserting such possession. In other words, the burden of proving title by adverse possession lies upon the person claiming to have acquired title by such possession.

The findings of the lower appellate court in the present case are that the plaintiff's title to the property in dispute has been proved, and that the evidence of both parties as regards possession is worthless. On these findings, in our judgement, the plaintiff was entitled to a decree.

The article applicable to a suit in which the plaintiff sues for possession of immoveable property on the basis of his title is article 144 of the first schedule to the Limitation Act, and if in such a suit the plaintiff proves his title, he is entitled to a decree, unless the defendant succeeds in establishing his adverse possession for a period of more than twelve years. To cases in which the plaintiff claims relief on the basis of his title article 142 has no application. That article applies to suits in which the plaintiff claims possession of property on the ground that while in possession he was dispossessed, or his possession was discontinued, by the defendant. In other words that article is restricted to

(1) (1916) I. L. R., 39 Mad., 617. (2) (1919) I. L. R., 41 All., 669.

(3) (1924) I. L. R., 47 All., 389. (4) (1928) I. L. R., 50 All., 813.

(5) (1928) I. L. R., 7 Pat., 649.



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cases in which the relief for possession sought by the plaintiff is based on what may be styled as possessory title. Every person is entitled to have his peaceful possession protected and no one has a right to take the law in his own hands and disturb the peaceful possession of another. Possession is in itself title and good against every body except the true owner. In short, there may be cases in which a person, though not the true owner, has been in peaceful possession of property and his possession is disturbed. In such cases the person dispossessed has a right to claim to be restored back to possession on proving the fact of his possession and his dispossession or discontinuance of his possession by the defendant within a period of twelve years prior to the institution of the suit. To such cases article 142 applies, and the burden of proving the fact that the plaintiff was in possession and was dispossessed within twelve years of the date of the suit lies on the plaintiff and, on proving these facts, the plaintiff is entitled to a decree unless the defendant establishes that he is the true owner of the property in dispute.

Another class of cases are those in which the plaintiff sues for possession of immoveable property both on the ground of his title and on the ground of his possession having been disturbed by the defendant. In such cases, if he proves his title the burden of establishing title by adverse possession for more than twelve years lies upon the defendant and if he succeeds in proving that fact the suit must fail, otherwise the plaintiff is entitled to a decree. To this extent article 144 will apply to such a suit. But it may be that the plaintiff, though not able to substantiate his title, is in a position to prove his possession and dispossession by defendant within twelve years. If that be the case, article 142 will apply and the burden will lie on the plaintiff. In short, suits for possession based both on the plaintiff's

title and possessory title invite the application of articles 142 and 144, according to the varying circumstances of each case.

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The view that we take is in consonance with the view of their Lordships of the Judicial Committee in *Secretary of State for India v. Chellikani Rama Rao* (1), and the decisions of this Court in *Jai Chand Bahadur v. Girwar Singh* (2) and *Ali Hammad v. Ghurpattar Singh* (3).

The learned advocate for the respondent has placed reliance on the cases of *Sita Ram Dube v. Ram Sundar Prasad* (4) and *Kamakhya Narayan Singh v. Ram Raksha Singh* (5). In our opinion, neither of these cases have any bearing on the controversy before us. All that was decided in the case of *Sita Ram Dube v. Ram Sundar Prasad* (4) was that, where a purchaser in execution has obtained delivery of possession in accordance with law, that would, as between the parties to the proceedings for delivery of possession, give a new start for the computation of limitation and the auction-purchaser is entitled to a decree for possession provided he brings his claim within 12 years from the date of delivery of such possession. No one can controvert that proposition of law, but that proposition has no application to the facts of the present case. The case of *Kamakhya Narayan Singh v. Ram Raksha Singh* (5) also has no bearing on the question before us. In that case the claim of the plaintiff, whose predecessor-in title had granted a lease, as against the assignee of the lessee was dismissed on the ground that no contract of tenancy between the lessor and the assignee of the lessee had been established and that the lessee had established his title by adverse possession for a period of more than

(1) (1916) I. L. R., 39 Mad., 617.

(2) (1919) I. L. R., 41 All., 669.

(3) (1924) I. L. R., 47 All., 389.

(4) (1928) I. L. R., 50 All., 813.

(5) (1928) I. L. R., 7 Fat., 649.

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twelve years. Similarly in the last case cited by the learned counsel for the respondent the claim of the plaintiff was dismissed as against the defendant on the ground that the plaintiff, having obtained a decree for possession against the defendant of that suit, had taken no step for a period of 12 years to enforce that decree and to obtain possession of the property. It is manifest that from the date of the decree for possession the possession of the defendant of that suit was in fact and in law adverse to the plaintiff of that suit and, as such, the view expressed by their Lordships of the Judicial Committee in that case in no way militates against the view taken by us in the present case.

For the reasons that we have given we allow this appeal, set aside the decrees of the courts below and decree the plaintiff's suit with costs in all courts.

*Before Justice Sir Shah Muhammad Sulaiman and Mr.  
 Justice Pullan.*

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 June, 28.

PUNJAB SUGAR MILLS Co. (DEFENDANT) v. LACHH-  
 MAN PRASAD (PLAINTIFF).\*

*Act (Local) No. XI of 1922 (Agra Pre-emption Act), section 8 (c)—"Purposes of a manufacturing industry"—Cultivation of sugarcane is not a "purpose of a manufacturing industry"—Recital of purpose in the sale deed not necessary.*

Purchase of land by a sugar manufacturing factory for the purpose of cultivation of sugarcane crops to be used as raw material for the factory is not a purchase "for the purposes of a manufacturing industry" within the meaning of section 8(c) of the Agra Pre-emption Act. Sugarcane growing is an agricultural pursuit quite separate and independent from the industry of manufacturing sugar. No doubt it is raw material required by a sugar factory, but the production of such raw material by agriculture is not part of the business of

\*First Appeal No. 455 of 1926, from a decree of Kauleshar Nath Rai, Subordinate Judge of Ghazipur, dated the 13th of September, 1926.

a manufacturer and is not a purpose of a manufacturing industry.

It is not necessary, in order that section 8(c) may be applicable, that the purpose of the purchase should be expressly mentioned in the sale deed.

[*Per PULLAN, J.*—But, at the same time, in view of the use of the word “ostensibly” in the last line of clause (c) of section 8, it would appear that the purchaser is bound in some way to let the purpose of the purchase be known, if he intends to take the benefit of section 8, clause (c).

Sir *Tej Bahadur Sapru* and Messrs. *P. N. Sapru* and *Uma Shankar Bajpai*, for the appellant.

Messrs. *Peary Lal Banerji*, *Kailas Nath Katju* and *Sankar Saran*, for the respondent.

SULAIMAN, J.:—This is a defendant's appeal arising out of a suit for pre-emption of shares sold in two mahals. The plaintiff is admittedly a co-sharer in the mahals and the defendant company which is the vendee is a stranger. The plaintiff alleged the existence of a custom of pre-emption and a right under the Pre-emption Act and also asserted that the ostensible consideration of Rs. 24,000 was not the true consideration but only Rs. 19,333-5-3 were paid. The defendant originally contested the claim on the ground that there was no custom of pre-emption, that the consideration mentioned in the sale deed was the true consideration and that the deed had been executed with the knowledge and consent and after the refusal of the plaintiff. Some days later, the written statement was amended and a further plea was added that the share in question had been purchased for the cultivation of sugarcane for the factory which was a manufacturing industry, and the plaintiff was therefore not entitled to pre-empt the same.

The learned Subordinate Judge has found that the plaintiff has the right of pre-emption under the Act and that the defendant is not entitled to protection on account of the purchase having been made for their factory. His

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view is that the acquisition of land for the purpose of sowing sugarcane crops is for the purpose of a manufacturing industry within the meaning of section 8, sub-clause (c), of the Act, but he has held that inasmuch as there was no recital of the alleged purpose in the sale deed the defendant cannot take advantage of it. As regards the plea of estoppel his finding is that there was no refusal by the plaintiff. On the question of consideration he has found in favour of the defendant and has held that the entire sum of Rs. 24,000 passed.

The defendant has appealed and the plaintiff has filed a cross-appeal. There can be no doubt that the manufacture of sugar, whether it be the extraction of sugar juice from sugarcane or the refinement of sugar, is a manufacturing industry, but the question is whether the defendant is entitled to the protection given to him by the section.

On the question of fact the learned Subordinate Judge has found that the property in question was really purchased for sowing improved sugarcane for the factory and also for obtaining cheap labour for the factory. Speaking personally for myself, I have some doubt as to whether the actual form in which the defence was raised was not an after-thought. The property acquired was not a complete village consisting of only *khudkasht* lands. Only a fractional share of about ten annas in the rupee was acquired, so that the defendant became a mere co-sharer in the mahals. That will not entitle the company to turn out all the tenants and convert the entire land into *khudkasht* land so as to enable it to carry on sugarcane plantation on a large scale. Nor was it legally possible for the company to turn out occupancy tenants against their will or to compel them to sow sugarcane crops or for the matter of that to sell their crops to the company and to nobody else. On the other hand the purchase of a big zamindari share in a neighbouring vil-

lage would undoubtedly facilitate the work of the company and increase their influence in procuring raw materials and labour easily. I therefore have some doubt as to whether the actual purpose for which the fractional share in the village was acquired was really cultivation by the company of the sugarcane crops. It may be noted that no such purpose is recited either in the original agreement which was executed several months earlier or in the sale deed. Nor was it mentioned when the written statement was first filed. It is admitted that only about 50 bighas of land are *sir* and *khudkasht* lands appertaining to the share, out of which a small area has already been brought under cultivation. The rest of the land is neither *sir* nor *khudkasht* and has not automatically come under the direct cultivation of the vendee by virtue of the sale deed.

Assuming, however, that the purpose of the acquisition was to sow sugarcane crops in order that sugarcane may be used as raw material for the consumption of the factory, it still remains to consider whether such a purpose comes within the scope of section 8, sub-clause (c). There is no doubt that the object of the legislature in excepting sales for purposes of manufacturing industry from pre-emption claims was the encouragement of manufacturing industries, not necessarily the encouragement of agriculture. It seems to me that sugar plantation or the cultivation of the sugarcane crops is an agricultural pursuit quite separate and independent from the industry of manufacturing sugar. Sugarcane crops are year to year crops sown during one season of the year and sugarcane can be had in the open market. No doubt it is raw material which is required by a sugar factory, but the production of such raw material is not a purpose of a manufacturing industry, though undoubtedly it is of help. Although the section cannot be construed in a narrow sense so as to apply exclusively to acquisi-

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*J.*

tions of land for the purpose of assisting the actual process of manufacture, it seems to me that it cannot apply to a case where raw material is to be produced by cultivation on a large scale in order that it may be utilised by the company. I would therefore hold that the purchase of land for such purposes does not come within the meaning of the section.

Having regard to the fact that section 8, sub-clause (c) uses the word "land", whereas some sections like sections 9 and 11 use the words "interest in the land" and other sections like sections 22 and 24 use the word "property", I would have been inclined to think that the intention of the legislature was to give protection to manufacturing industries when plots of land as distinct from fractional shares in a zamindari are acquired. I find however that the word "land" is used loosely for an interest in land at least in another section, viz. section 14. On this ground I refrain from expressing any definite opinion that the word "land" is not applicable to shares in a zamindari.

I further do not agree with the view expressed by the learned Subordinate Judge that in order that benefit may be taken of the section there ought to be a clear and express recital of the purpose in the sale deed. No doubt the difficulties pointed out by him when a contrary interpretation is put on the section are somewhat serious. If the purpose is not recited in the sale deed it is difficult to see how the pre-emptor can judge whether the land is being used for the purpose for which it was ostensibly purchased. It is also clear that if there is no such recital the vendee can, after the expiry of one year, turn the land to some other use. In spite of these difficulties it is our duty to interpret the section as it stands; and I see no ground for interpolating the words "as mentioned in the sale deed" into the section.

That these words cannot be understood is also clear from the following circumstances. Under section 54 of the Transfer of Property Act immoveable property of less than Rs. 100 can be purchased without any instrument at all, the delivery of possession alone being sufficient. Section 8, sub-clause (c) undoubtedly contemplates such a transfer and would apply where the land is not used for the purpose for which it was ostensibly purchased. As there might be no document in such a case the recital in a deed of sale cannot be an indispensable requisite. I therefore hold that the omission of the recital in the sale deed is not a fatal defect to the suit.

On the question of the refusal of the plaintiff the finding of the court below must be affirmed.

[The judgement then proceeded to discuss the evidence on this point.]

The finding as regards the amount of consideration which is challenged in the cross-appeal must also be accepted.

[After discussing the evidence the judgement concluded as follows.]

I would therefore affirm the finding of the court below on this point and dismiss both the appeal and the cross-objection.

PULLAN, J. :—As I am in general agreement with the judgement just pronounced, I only think it necessary to add a few observations as to the interpretation of section 8, sub-clause (c) of the Agra Pre-emption Act. One of the questions which has to be decided in this appeal is, what is the meaning of the words “purposes of a manufacturing industry?” The lower court and the learned counsel for the appellant consider that the growing of sugarcane is one of the purposes of the industry of making sugar. In my opinion it is not.

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*Pullan, J.*

Sugarcane growing is an ancillary industry of an entirely different nature carried on by agriculturists and not by manufacturers. The manufacturer of sugar is obliged in common with all other manufacturers to use raw material, but it is no part of his business as a manufacturer to grow that material, any more than it is the part of the cotton miller to grow cotton or the flour miller to grow grain. The purpose of a manufacturing industry is the object which the industry sets out to attain. It has no reference to the materials which may be used in some form or another for the accomplishment of that result. This is particularly so in a case such as this, where the raw materials are of an agricultural nature.

A second question which arises is the meaning to be given to the word "ostensibly" in the last line of the clause. I agree with my learned brother in holding that it is not necessary that the intention with which land is purchased should be entered in the sale deed, but if the word "ostensibly" is to have any meaning it would appear to me that the purchaser is bound in some way to let it be known why he intends to purchase the land, if he intends to take advantage of section 8, sub-clause (c). If the purchaser has no means of knowing that the land is being purchased for the purposes of a manufacturing industry he is severely handicapped. Beyond this I am not prepared to go, as in the present case no doubt it may be reasonably said that where an absentee firm of sugar manufacturers buys land close to the factory, they have probably done so for some purpose connected with the factory.

By THE COURT :—We dismiss both the appeals with costs.

*Before Mr. Justice Bennet and Mr. Justice Iqbal Ahmad.*

JUGUL KISHORE (DEFENDANT) *v.* BANWARI LAL  
AND OTHERS (PLAINTIFFS).\*

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Act No. IV of 1882 (*Transfer of Property Act*), section 55(1)

(g)—*Vendor's liability to discharge prior incumbrances—  
Sale not specifically made subject to incumbrances—  
Vendee's knowledge of incumbrances immaterial.*

Unless there is a specific stipulation in the sale deed that the property is sold subject to incumbrances, the vendor is liable, under the provisions of section 55(1)(g) of the *Transfer of Property Act*, to pay the incumbrances existing on the property, even if the vendee was aware of their existence. *Bhagwati v. Banarsi Das* (1), referred to.

Messrs. Peary Lal Banerji and Kailas Chandra Mital, for the appellant.

Dr. N. C. Vaish and Mr. Janaki Prasad, for the respondents.

BENNET and IQBAL AHMAD, JJ. :—This is a second appeal by the defendant on a very simple point. The defendant bought certain property at an auction-sale on the 20th of December, 1918, for a price which has not been disclosed but is said to be between three and four hundred rupees. The sale proclamation sets out that that property was subject to a prior mortgage of the 28th of June, 1912.

The defendant sold the property to the plaintiff by a sale deed dated the 22nd of June, 1920, in which he stated that he was selling the property which he had purchased at the auction-sale of the 20th of December, 1918. The sale consideration was Rs. 1,000. Subsequently a suit, No. 9 of 1923, was brought by the mortgagee for

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\*Second Appeal No. 882 of 1926, from a decree of Joti Sarup, Second Subordinate Judge of Saharanpur, dated the 10th of April, 1926, reversing a decree of Sheo Narain Vaish, Munsif of Deoband, dated the 21st of July, 1925.

(1) (1928) I. L. R., 50 All., 371.

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Rs. 2,200 on the mortgage of the 28th of June, 1912, and in that suit the 20th of May, 1925, was fixed for sale. The plaintiff brought the present suit on the 29th of April, 1925, asking for alternative reliefs, either that the defendant might be directed to pay the amount due to the mortgagee or that the defendant might be directed to pay to the plaintiff the sale consideration of Rs. 1,000. The court of first instance dismissed the suit, and the lower appellate court decreed it. The point before this Court is very simple. The Transfer of Property Act, section 55(1) (g) states that the seller is bound, except where the property is sold subject to incumbrances, to discharge all incumbrances on the property then existing. There is no contract in regard to prior incumbrances in the sale deed in question. It was argued by the learned advocate for the appellant that the section quoted means that the vendor is only liable if he stated in the sale deed that he sold free from incumbrances. We cannot agree to this interpretation of the section. It appears to us that the section clearly means what it states, that there must be a provision in the sale deed that the property is sold subject to incumbrances, and if that provision is not specifically set out in the sale deed, then the vendor will be liable for all prior incumbrances. No authority was shown to us for the strange interpretation which the learned advocate for the appellant desired to place on this section. He referred to a ruling of the Privy Council, *Bhagwati v. Banarsi Das* (1), in which in a slightly different case the Privy Council had held that the vendor was liable. The argument apparently was that because the facts of the present case are not precisely similar, therefore in the present case the vendor would not be liable. The argument is obviously unsound. A certain amount of argument was made in regard to the statement in the sale deed that what the vendor sold was what he

(1) (1928) I. L. R., 50 All., 371.

had purchased at the auction-sale of the 20th of December, 1918, and it was argued that the vendee should have ascertained what was in the sale proclamation and have referred to the mortgage of the 28th of June, 1912, which is mentioned in the sale proclamation. It was admitted by the learned advocate for the appellant that no copy of the sale proclamation or sale certificate was given to the vendee at the time of the sale to him. A further argument was made that it was open to the vendee to have ascertained by inquiry from the office of the Sub-Registrar that the incumbrances of the 28th of June, 1912, did exist on this property. We consider that even if the vendee had ascertained from this source that incumbrances did exist, still that would be no answer for the provision in section 55(1) (g), which requires that there should be a specific contract set forth in the sale deed that the property is sold subject to incumbrances, otherwise the vendor is liable to pay the incumbrances.

We consider the finding of the lower appellate court is correct and dismiss this appeal with costs.

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ACTS—1872—I (EVIDENCE ACT), SECTIONS 34, 67—*Account-books—"Regularly kept in the course of business"—Formal proof of regularity unnecessary—Act (Local) No. X of 1922 (U. P. District Boards Act), section 3A—False defence of accused alleging criminal conspiracy to bring false charge against him—Aggravation meriting severer sentence.* Account-books are admissible in evidence under section 34 of the Evidence Act, 1872, without any formal proof that they were regularly kept in the course of business. The legislature, in section 34, has dispensed with the necessity of such formal proof, which was required by the former Act II of 1855.

In order that account-books may be deemed regularly kept in the course of business it is not necessary to show that they had been entered up as and when the transactions took place. It is a matter of intrinsic evidence as to whether the books in question are books of account and regularly kept in the course of business.

Where it is not alleged that an account-book has been wholly or partly written by any particular person, section 67 of the Evidence Act does not apply.

False allegations against innocent and respectable persons of a criminal conspiracy to bring a false charge against the accused, when used as a defence, aggravates greatly the original offence, and the fact ought to be taken into consideration in awarding punishment.

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ACTS—1872—IX (CONTRACT ACT), SECTIONS 11 AND 25(2)—*Minor—Money borrowed on bond by a minor—Fresh bond executed after attaining majority for the original loan plus interest—Whether valid.* Where a minor borrowed a sum of money, executing a simple bond for it, and after attaining majority executed a second bond in respect of the original loan plus interest thereon :

*Held* by SULAIMAN, A. C. J., and BOYS, J., (MUKERJI, J., dissenting), that a suit upon the second bond was not maintainable, as that bond was without consideration and did not come under section 25, clause (2), of the Indian Contract Act.

*Per* MUKERJI, J.—Section 25, clause (2), applied to the case and the bond was not void for want of consideration.

*Mohori Bibee v. Dharmodas Ghose*, I. L. R., 30 Cal., 539.  
*Binedshri Prasad v. Sarju Singh*, 21 A. L. J., 446, *Narain Singh v. Chiranjil Lal*, I. L. R., 46 All., 568, *Gregson v. Uday Aditya*

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ACTS—1872—IX (CONTRACT ACT), SECTION 239— <i>Hindu law—Partnership entered into with strangers by a member of a joint Hindu family—Liability of other members—Presumption.</i> The presumption in the case of a joint Hindu family, where a nucleus is proved, that property standing in the name of a junior member was acquired out of the family funds and belongs to the family cannot be extended to cases of partnership with strangers.	

The joint family as a jural unit, or a member in his individual capacity, may enter into an agreement of partnership with persons outside the family. In each of these cases the nature and incidents of the partnership have to be determined by the evidence produced.

There can be no presumption that a business carried on by a coparcener in partnership with strangers is a family business. Where a business is carried on by one of the members of a joint Hindu family, then until the rest of the members claim the benefits arising therefrom or until the business is in some way adopted as an asset of the joint family, it would be contrary to principle to fasten on the other members any liability for the debts of that business. It must be shown by the creditor who advances such a claim that the business carried on by an individual member has by some such method become the business of the family or is carried on for its benefit.

An agreement, express or implied, is essential for the creation of a partnership, under the Contract Act, A presumption in

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favour of such an agreement may be raised from the conduct of the parties, from their mutual dealings, and from the surrounding circumstances, but there is no presumption in law that a member of a joint Hindu family entering into a partnership with strangers is doing so in a representative or vicarious capacity. *Parbati Dasi v. Raja Baikuntha Nath De*, 12 A.L.J., 79 *Bandhu Ram v. Chintaman Singh*, 20 A. L. J., 495, *Lala Jagan Lal v. Mathura Prasad*, 39 Indian Cases, 498, *Punnu v. Kousa*, 40 Indian Cases, 463, and *Annamalai Chetty v. Subramanian Chetty*, 33 C. W. N., 435, distinguished. *Moti Ram v. Muhammad Abdul Jalil* I. L. R., 46 All., 509, *Mewa Ram v. Ram Gopal*, I. L. R., 48 All., 395; *Gauri Shankar v. Keshab Deo*, [1929] A. L. J., 204; *Anant Ram v. Channu Lal*, I. L. R., 25 All., 378; and *Kharidar Kapra Co. v. Daya Kishan*, I. L. R., 43 All., 116; referred to. *Gangayya v. Venkataramiah*, I. L. R. 41 Mad., 454, *Vadilal Lalubhai v. Shah Khushal*, I. L. R., 27 Bom., 157; *Baldeodas v. Manekchand* 3 Bom. L. R., 144; and *Palaniappa Chetty v. Official Assignee of Madras*, 36 Indian Cases, 787; followed. *Malaiperumal Chettiar v. Arunachalla Chettiar*, 41 Indian Cases, 224, *Grey v. Lamond Walker*, I. L. R., 40 Cal., 523 and *Cox v. Hickman*, 8 H. L. C., 268, referred to.

*Mirza Mal Bhagwan Das v. Rameshar*, I. L. R., 51 All. 827.

ACTS—1873—VIII (NORTHERN INDIA CANAL AND DRAINAGE ACT), SECTIONS 8, 10 AND 67—*Jurisdiction—Suit for damages—Powers and duties of Canal Department—Riparian owner—Flooding of adjoining lands—Negligence.*] A canal constructed by Government about 1860 had to cross the bed of a hill stream. A super-bridge with embankments was constructed for passing the water of the stream above the canal and thence flowing it on in a certain direction, and embankments were also constructed at the place where the stream left the super-bridge, the embankments preventing the water overflowing and flooding the adjoining lands. The accumulation of silt used to be removed by Government from time to time, up to the year 1917, when the practice was discontinued, and the consequent accumulation of silt caused the water of the stream to overflow its banks in 1922, flooding and injuring the lands in the neighbourhood, of which the plaintiffs were the agricultural tenants. They brought a suit against the Government for damages and for an injunction.

*Held*, (1) the civil court had jurisdiction to try the suit, and there was nothing in the Northern India Canal and Drainage Act against such jurisdiction.

(2) The Canal Department had power to concentrate the waters of the stream and to carry them over the canal by the super-bridge; they had also the power, if they so chose, to remove the silt and maintain the height of the banks and thereby to prevent flooding of the neighbouring lands and injuring the rights of the occupiers thereof. They failed to exercise this power when they discontinued their practice of removing the silt, and the discontinuance was not warranted by any authority derived from any legislative enactment and amounted to negligence, and they were liable for the damages resulting therefrom.

(3) The fact that the plaintiffs became tenants of the lands after the discontinuance did not disentitle them to the damages, as the duty of the canal department regarding the removal of silt was a pre-existing one. *Sankaravadivelu Pillai v. Secretary of State for India in Council*, I. L. R., 28 Mad., 72, *Geddis v. Proprietors of the Bann Reservoir*, [1878] L. R., 3 A. C., 430, and *Bligh v. Rathangan River Drainage Board*, 2 Ir. R., 205, fol-

lowed. *Cracknell v. The Mayor and Corporation of Thetford*, L. R., 4 C. P., 629 and *Lagan Navigation Co. v. Lambeg Bleaching etc. Co.*, [1927] A. C., 226, distinguished.

Secretary of State for India in Council *v.* Alladin, I. L. R., 51 All. ...

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ACTS—1881—XXVI (NEGOTIABLE INSTRUMENTS ACT), SECTION 98 (e), *See* Cause of Action ...

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ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTION 6(d) AND (e)—*Right to recover future maintenance—Transfer of personal allowance charged on immovable property—Kharch-i-pandan.*] The question whether the right to recover future maintenance allowance is alienable or not depends not on whether a charge has been created for the same but on the true intention of the parties. If the intention was that the right should be restricted in its enjoyment to the owner personally, it cannot be transferred under section 6 (d) of the Transfer of Property Act. Nor can a mere right to sue for the remainder of allowance that may fall due in future be transferred under clause (e) of the section.

*Kharch-i-pandan* is a personal allowance, and, in the absence of any clear provision in the deed signed by the prospective husband, fixing the allowance in favour of his wife, that it was alienable, it could not be held so on the mere fact that the payment was secured by a charge on immovable property.

*Gulab Kunwar v. Bansidhar*, I. L. R., 15 All., 371, *Haridas Acharjia v. Baroda Kishore*, I. L. R., 27 Cal., 38, *Sher Singh v. Sri Ram*, I. L. R., 30 All., 246, *Ranee Annapurni v. Swaminatha*, I. L. R., 34 Mad., 7, *Khuraja Muhammad Khan v. Husaini Begam*, I. L. R., 32 All., 410 and *Harris v. Brown*, I. L. R., 28 Cal., 621, referred to; *Subraya Sampigethaya v. Krishna Bai-padithaya*, I. L. R., 46 Mad., 659, and *Tara Sundari Debi v. Saroda Charan Banerjee*, 12, C. L. J., 146, followed.

*Altaf Begam v. Brij Narain*, I. L. R., 51 All., ...

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ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTION 51—*Improvement—Bona fide purchase without notice of mortgage—Improvement made in the bona fide belief of absolute title—Equity—Act not exhaustive.*] A bona fide purchaser of a house for value, without notice of an existing simple mortgage, and honestly believing in good faith that she was absolutely entitled to the house, improved and rebuilt it at considerable cost. On suit by the mortgagee for sale of the house, held that although section 51 of the Transfer of Property Act did not in terms apply, yet the rule of equity upon which that section was based might very well be extended to the case, and upon that basis the court was justified in ordering the plaintiff to pay the cost of the improvements as a condition precedent to bringing the mortgaged property to sale.

The Transfer of Property Act is not exhaustive and does not exclude any equitable principle such as may regulate the rights and liabilities of the parties in a case not specifically provided by the legislature.

*Kalyan Das v. Jan Bibi*, I. L. R., 51 All. ...

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ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTION 53—*Fraudulent transfer—Principle applicable to transfer under a fraudulent and collusive decree on award.*] The principles embodied in section 53 of the Transfer of Property Act are in accordance with the general principles of justice, equity and good conscience and as such should be taken as a guide by the courts even in cases where the provisions of section 53 do not in terms apply, e.g. because the transfer is by virtue of a decree on an award. Where,



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ostensibly, a dispute between a Muhammadan husband and wife regarding dower was referred to arbitration, and the husband transferred his property to the wife in accordance with the decree passed on the award, but the circumstances showed that there was no real dispute regarding the dower, and the appointment of an arbitrator was a mere trick for the purpose of obtaining a colourable award and a decree upon which to base the collusive and nominal transfer, with the object of saving the property from the impending claim of certain creditors, it was held that the principle of section 53 was applicable and the transfer was voidable by the creditors. *Champo v. Shankar Das*, 14 Indian Cases, 232, *Ibrahim v. Jivan Das*, [1924], A. I. R., (Lah.), 707, and *Bhagwant Appaji v. Kedari Kashinath*, I. L. R., 25 Bom., 202, referred to.

*Akram-un-nissa Bibi v. Mustafa-un-nissa Bibi*, I. L. R., 51 All. ... 595

ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTION 53, *See* Act No. V of 1920 (Provincial Insolvency Act), sections 4, 53 ... 550

ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTION 54—Act No. X of 1897 (*General Clauses Act*), section 3, clauses (25) —“Immoveable property”—*Mortgagee's interest under a simple mortgage—Assignment of mortgagee's interest without registered document—Estoppel.*] The interest of a simple mortgagee is immoveable property, as defined by the General Clauses Act, 1897, and within the meaning of the provisions of the Transfer of Property Act; and a transfer of such interest can only be effected by means of a registered instrument, as required by section 54 of the Transfer of Property Act.

The parties to an arrangement for the assignment of such an interest by the one to the other without the execution of a registered instrument may, where the arrangement is carried out and acted upon, themselves be estopped from going behind it, but that arrangement cannot be effective as a legal transfer so far as third parties are concerned.

*Mutsaddi Lal v. Muhammad Hanif*, 10 A. L. J., 167, *Paresh Nath Singha v. Nabogopal*, I. L. R., 23 Cal., 1, and *Nataraja Iyer v. The South Indian Bank of Tinnevely*, I. L. R., 37 Mad., 51, referred to. *Abdul Majid v. Muhammad Faizullah*, I. L. R., 13 All., 89, *Karim-un-nissa v. Phul Chand*, I. L. R., 15 All., 134, and *Lal Umrao Singh v. Lal Singh*, I. L. R., 46 All., 917, distinguished.

*Bank of Upper India, Limited (In Liquidation) v. Fanny Skinner*, I. L. R., 51 All. ... 494

ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTION 55 (1) (g)—*Vendor's liability to discharge prior incumbrances—Sale not specifically made subject to incumbrances—Vendee's knowledge of incumbrances immaterial.*] Unless there is a specific stipulation in the sale deed that the property is sold subject to incumbrances, the vendor is liable, under the provisions of section 55 (1)(g) of the Transfer of Property Act, to pay the incumbrances existing on the property, even if the vendee was aware of their existence. *Bhagwati v. Banarsi Das*, I. L. R., 50 All., 371, referred to.

*Jugul Kishore v. Banwari Lal*, I. L. R., 51 All. ... 1053

ACTS—1882—IV (TRANSFER OF PROPERTY ACT). SECTION 55(2)—*Implied covenant—Covenant running with the land—Indemnity clause—Vendees from pre-emptor of original vendee entitled to the benefit—Act No. IX of 1908. (Limitation Act). article 116—Applicability to implied covenant.*] On the 12th of February, 1912, H

sold some zamindari property to *M* and others. By this sale deed *H* agreed to indemnify the vendees if by any act of himself or by any claim of his children or the members of his family any defect arose in the property. *K* sued for pre-emption and on the 25th of January, 1913, obtained a decree, and thereafter, possession. On the 6th of August, 1916, *K* and his joint brothers sold half the pre-empted property to the plaintiffs Nos. 1, 2 and three others. No indemnity clause was inserted in this sale-deed. Subsequently the sons of *H* sued for cancellation of the sale-deed of 1912, and got a decree and obtained delivery of possession of the whole property on the 12th of March, 1921.

The present suit was filed, in 1925, for compensation for breach of contract, based on the indemnity clause contained in the earlier sale-deed of 1912, by the brothers and survivors of *K* and two of the five vendees.

*Held* (1) that even if the vendees of *K* and his brothers could not succeed on the express covenant in the sale-deed of 1912, they were entitled to succeed on the implied covenant as to title which runs with the land, under section 55(2) of the Transfer of Property Act;

(2) that article 116 of the Limitation Act applied and therefore the suit was within time:

(a) that the word "contract" used in article 116 of the Limitation Act should also include an implied contract.

*Gobind Dayal v. Inayat-ullah*, I.L.R., 7 All., 775, referred to; *Kundan Lal v. Bisheshar Dayal*, I. L. R., 50 All., 95, not followed; *Mul Kunwar v. Chatter Singh*, I. L. R., 30 All., 402, followed; *Janak Singh v. Walidad Khan*, 13 A. L. J., 669, not followed; *Nabin Chandra Ganguly v. Munshi Mander*, I. L. R., 6 Pat., 606, *Sigamani Pandithan v. Munibadra Nainar* [1926] A. I. R., (Mad.), 255, *Ganapa Putta Hegde v. Hammad Saiba*, I. L. R., 49 Bom., 596, *Injad Ali v. Mohini Chandra Adhikari*, [1924] A. I. R., (Cal.), 148 and *Tricomdas Cooverji Bhoja v. Gopinath Jiu Thukur*, I. L. R., 44 Cal., 759, followed.

*Hanwant Rai v. Chandi Prasad*, I. L. R., 51 All. ... 651

ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTION 56—Applicability to auction sales, *See* Act No. IX of 1908 (Limitation Act), article 61 ... 606

ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTION 65(a)—*Transfer of equity of redemption—Covenant of title binding upon transferee—Estoppel.* The implied covenant under section 65(a) of the Transfer of Property Act that the mortgagor has power to transfer the property is one that is binding upon a transferee of the equity of redemption, and the transferee is estopped from pleading that the mortgagor had no right to make the mortgage, *Renga Srinivasa Chari v. Gnanaprakasa Mudaliar*, I. L. R., 30 Mad., 67, distinguished. *Debendra Nath Sen v. Mirza Abdul Samed*, 10 C. L. J., 150 and *Doe v. Stone*, 3 C. B., 176, referred to.

*Achhaibar Singh v. Rajmati*, I. L. R., 51 All. ... 802

ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTION 83—*Deposits in favour of two persons—Claim by one to be sole mortgagee by survivorship—Court's failure to decide claim—Revision.* Where a deposit of mortgage money was made under section 83 of the Transfer of Property Act in favour of two persons as mortgagees, and one of them claimed to be entitled as sole mortgagee on the allegation that the other, who was his father, must be presumed to be dead as he had not been heard of for seven years, *held* that the court was competent to ascertain who was the mortgagee at the present time, i.e., whether the claimant was alone entitled to

withdraw the money; and that in declining to do so the court had failed to exercise a jurisdiction vested in it by law.

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- Balbhaddar Prasad v. Bitto, I. L. R., 51 All. ... 1016  
 ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTION 83, *See Mortgage* ... 686

ACTS—1887—IX (PROVINCIAL SMALL CAUSE COURTS ACT), SECTION 17—*Deposit of security within limitation—Accepted by court—Security subsequently found to be ineffective—Fixed deposit receipt deposited as security without hypothecation bond.*] In execution of an *ex parte* decree passed by a small cause court a fixed deposit, belonging to the judgement-debtor, in a certain Bank was attached. The judgement-debtor applied for setting aside of the *ex parte* decree and stated that the fixed deposit which had been attached should be taken as security required by section 17 of the Provincial Small Cause Courts Act. Subsequently, and within the period of limitation for making the application, he deposited his fixed deposit receipt in court, but without any security bond hypothecating its amount, and on the same day the court accepted it as sufficient. The decree-holder objected that no sufficient security had been deposited.

*Held*, that no adequate security had been furnished; but inasmuch as the security was accepted by the court and by reason of that acceptance the judgement-debtor was misled and was deprived of an opportunity to make good the security before the limitation expired, it should not be said in this case that he had failed to furnish security "to the satisfaction of the court," and he should be given a fresh opportunity to deposit adequate security.

*Semble*, the mere fact that security is not deposited along with the application for setting aside the *ex parte* decree is not fatal to the application, if the security is deposited at any time before the expiry of the limitation for the application itself.

- Kiran Koomar Banerji v. Baij Nath, I. L. R., 51 All., 402

ACTS—1887—XII (BENGAL N.-W.P. AND ASSAM CIVIL COURTS ACT), SECTION 22—*Transfer of appeal—Jurisdiction—Criminal Procedure Code, section 476—Munsif's order in proceedings under section 476—Appeal transferred to Subordinate Judge.*] A District Judge is competent, under section 22 of the Bengal, N.-W.P. and Assam Civil Courts Act, to transfer to a Subordinate Judge an appeal from an order passed by a Munsif in proceedings under section 476 of the Code of Criminal Procedure.

- Karimullah v. Rameshwar Prasad, I. L. R., 51 All. ... 344

ACTS—1890—VIII (GUARDIANS AND WARDS ACT), SECTIONS 27, 30—*Powers of certificated guardian—Starting a new speculative business—Contract with guardian beyond his powers is voidable—Wagering contracts—Forward contracts for purchase of goods—Act No. IX of 1872 (Contract Act), sections 30, 64, 65.*] Where the certificated guardian of a minor, who had inherited an ancestral business of trading in cloth and money-lending, started on behalf of the minor an entirely new business of dealings in sugar and entered into forward contracts of a highly speculative character for the sale of sugar, and it was not even alleged that there was any pressure of necessity to do so: *Held*—

The certificated guardian had no power to start on behalf of the minor a new and speculative business. The powers and duties of a certificated guardian were governed by section 27 and other provisions of the Guardians and Wards Act;

and the action of the guardian in question could not be regarded as one for "protection or benefit of the property" within the meaning of that section. The position of a guardian was somewhat analogous to that of a trustee.

A contract entered into with the certificated guardian of a minor, which is beyond the authority of such guardian, is, by analogy with section 30 of the Guardians and Wards Act, a voidable contract and not a void transaction; and, under section 64 of the Contract Act, the party rescinding it must restore any benefit, e.g., earnest money, already received thereunder.

Every forward contract is to some extent speculative, but is not necessarily a wagering contract. The recognized test to be applied is whether at the time of entering into the contract there was a definite agreement or understanding between the parties that the performance of the contract by delivery of goods was not to be demanded, but that differences in price only should become payable. The mere fact that there was a boom in speculation regarding the particular commodity at about the period of the contract, and that in many cases obligations were being settled by the payment of differences, would not prove that the contract was a wager.

*Sanyasi Charan Mandal v. Krishnadhan Banerji*, I. L. R., 49 Cal., 560, *Sukdedoss Ramprasad v. Govindoss*, I. L. R., 51 Mad., 96, *Kong Yee Lone & Co. v. Lowjee Nanjee*, I. L. R., 29 Cal., 461, *Chinnaswami Reddi v. Krishnaswami Reddi*, I. L. R., 42 Mad., 36, and *Zinda v. Mt. Roshnai*, A. I. R., 1928 Lah., 250, followed.

*Ramdin Hazari Lal v. Mansaram Murlidhar*, I. L. R., 51 All. . . . . 1027

ACTS—1890—VIII (GUARDIANS AND WARDS ACT)—Order calling for accounts from heir of deceased guardian, *See* Guardian and Ward 899  
ACTS—1890—IX (RAILWAYS ACT), SECTION 77—Notice of claim—"Deterioration"—Delay in delivery—Fall in market rate.] The word "deterioration" in section 77 of the Railways Act includes loss in value owing to delay in delivery and a fall in the market value of the goods consigned. Hence, a suit for the recovery of such loss is not maintainable without the notice required by the section.

*Bhagwan Das Lachmi Narain v. Bengal-Nagpur Railway*, I. L. R., 51 All. . . . . 895

ACTS—1894—I (LAND ACQUISITION ACT), SECTIONS 21 AND 23(1)—Land occupied by occupancy tenants—Assessment of value of such land—Apportionment of compensation between landlord and tenants—Valuation of occupancy rights—Scope of inquiry by District Judge—Extent of rights of objector where the other parties have not contested the award.] In proceedings under section 21 of the Land Acquisition Act, 1894, commenced on the objection of the zamindar of the acquired land, the District Judge can re-apportion the shares, out of the total compensation money, payable respectively to the zamindar and the occupancy tenants, although the tenants did not contest the Collector's award; and the zamindar is entitled to the share so apportioned to him and has no right to demand the whole of the compensation money minus the amount awarded to the tenants by the Collector.

Under section 23(1) of the Land Acquisition Act, in determining the amount of compensation the court should take into consideration the market value of the land, and this would mean that the value of the land should be ascertained irrespective of the

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question as to how it is held, i.e. whether by the landlord himself or by permanent or temporary tenants.

Considerations and criteria for the apportionment of the compensation money between the zamindar and the occupancy tenants were laid down by the High Court, and where the District Judge had apportioned the money in the shares of 2 annas and 14 annas, respectively, the High Court altered the shares to 10 annas and 6 annas, respectively.

*L. W. Orde v. Secretary of State for India in Council*, I. L. R., 40 All., 367, not approved. *Raja of Pittapuram v. The Revenue Divisional Officer, Cocanada*, I. L. R., 42 Mad., 644, referred to.

*Rohan Lal v. The Collector of Etah*, I. L. R., 51 All. ... 765

ACTS—1899—IX (INDIAN ARBITRATION ACT), SECTION 19, *See Arbitration* ... 874

ACTS—1908—IX (INDIAN LIMITATION ACT), SECTION 5, ARTICLE 163—*Civil Procedure Code, order IX, rule 4—Application for restoration—Extension of time—Jurisdiction.*] Section 5 of the Limitation Act does not apply to an application under order IX, rule 4, of the Civil Procedure Code for restoration of a suit dismissed for the plaintiff's failure to pay process fee, and the court has no jurisdiction to extend the 90 days' limitation fixed by article 163 of the Limitation Act for such an application.

*Kali Prasad v. Parmeshwar Prasad*, I. L. R., 51 All. ... 487

ACTS—1908—IX (LIMITATION ACT), SECTION 28; ARTICLE 144, *See Civil Procedure Code, section 66* ... 675

ACTS—1908—IX (LIMITATION ACT), ARTICLE 61—*Auction purchase by mortgagee decree-holder—Sale set aside under order XXI, rule 89 by vendee of part of mortgaged property—Vendee's suit for possession or repayment—Transfer of Property Act (IV of 1882), section 56—Contribution.*] On the 11th of September, 1874, defendants' ancestors mortgaged 3 as. 1-33 pies in a village to one G, who on the 25th of June, 1919, purchased the property in execution of his decree. Plaintiffs, who were purchasers under simple money decrees of a 1 a. 7-33 pies share, deposited the decretal amount under order XXI, rule 89 of the Code of Civil Procedure and got the sale of the 25th of June, 1919, set aside. The plaintiffs then sued for possession of the property mortgaged in the deed of 1874 or in the alternative for the amount paid with interest from the date of payment. *Held* that the plaintiffs' suit was not time-barred and that article 61 of the Indian Limitation Act did not apply; and that the property in the hands of the parties must contribute rateably to G's decree.

The provisions of section 56 of the Transfer of Property Act do not apply to the case of a sale by auction.

*Held* further that until the sale is confirmed the interest of the judgement-debtor is not transferred to the auction purchaser, and where in a case that interest is not transferred, it cannot be said that the right of redemption has come to an end. *Shah Mehdi Hasan v. Ismail Hasan*, I. L. R., 42 All., 517, distinguished. *Bisheshur Dial v. Ram Sarup*, I. L. R., 22 All., 284, followed.

*Naubat Lal v. Mahadeo Prasad*, I. L. R., 51 All. ... 606

ACTS—1908—IX (LIMITATION ACT), ARTICLE 116—*Applicability to implied covenants* ... 651

ACTS—1908—IX (INDIAN LIMITATION ACT), SCHEDULE I ARTICLES 120, 141—*Limitation—Suit for possession—Suit by reversionary heir—Adverse possession for twelve years at widow's death—Suit*

for declaration during widow's life—Civil Procedure Code, order II, rule 2.] A decree against a Hindu widow in relation to her deceased husband's property is binding upon the reversioners although it is founded upon limitation; but under the Indian Limitation Act, 1908, schedule I, article 140, a suit by the reversionary heir for possession of immoveable property of the estate, as to which no decree has been made against the widow, is not barred by limitation if it is brought within twelve years of his estate falling into possession, even though the defendant has been in adverse possession for twelve years at the date of the death of the widow. *Hari Nath v. Mothurmohun*, I. L. R., 21 Cal., 8, and *Runchordas v. Parvatibai*, I. L. R., 28 Bom., 725, followed.

The article of the above Act applicable to a suit for a declaration that a will is invalid so far as it purports to dispose of a *malikana* granted by Government is article 120; and the right to sue does not accrue until the plaintiff has obtained a certificate under the Pensions Act, 1871; the suit is, therefore, not barred if brought within six years of obtaining the certificate.

A reversioner on the death of a Hindu widow who has sued during the widow's life for a declaration as to his rights, is not barred by order II, rule 2, from including in a suit brought after her death a claim which the court was not competent to deal with in the previous suit owing to the absence of a certificate under the Pensions Act, 1871, or a claim to possession which he was not then entitled to.

*Jaggo Bai v. Utsava Lal*, I. L. R., 51 All. ... 439  
 Acts—1908—IX (INDIAN LIMITATION ACT), ARTICLES 123 AND 144—  
*Suit by an heir of a deceased Muhammadan for his share of the inheritance, against his co-heirs and the transferees from some of them—Plaintiff alleging joint possession with, and subsequent adverse possession by, co-heirs—Article 144 applies.]* Where, after the death of a Muhammadan, one of the heirs is dispossessed by his co-heirs from the property left by the deceased, or has not obtained possession and later on the co-heirs in possession set up a title and execute a transfer inconsistent with his rights, and he then brings a suit against the co-heirs (and their transferees) for recovery of possession of his share, the suit is not one for a distributive share of the property of an intestate, but is a suit for possession of the defined share of one co-owner which is in the adverse possession of the other co-owners. Such a suit is not governed by article 123, but by article 144 of the Limitation Act.

Article 123 of the Limitation Act applies to those suits in which the plaintiff seeks to obtain his legacy or share from a person who, as administrator, represents the estate of a deceased person and is under a legal duty to pay legacies and distribute shares to those entitled to them.

The Privy Council case of *Maung Tun Tha v. Ma Thit*, I. L. R., 44 Cal., 379, explained and distinguished.

*Umardaraz Ali Khan v. Wilayat Ali Khan*, I. L. R., 19 All., 169, *Khadarsa Hajee Bappu v. Puthen Veetil Ayissa*, I. L. R., 34 Mad., 511, *Aziz-ul-Haq v. Mariyam Bibi*, 17 Oudh Cases, 157, *Bashir-un-nissa Bibi v. Abdur Rahman*, I. L. R., 44 All., 244, *Kallangowda v. Bibishaya*, I. L. R., 44 Bom., 943, and *Nuridin Najbudin v. Bu Umrao*, I. L. R., 45 Bom., 519, followed. *Mahomed Riasat Ali v. Hasin Banu*, I. L. R., 21 Cal., 157, referred to. *Shirinbai v. Ratanbai*, I. L. R., 43 Bom., 845, *Sri Rajah Parthasarathy Appa Rao v. Sri Rajah Venkatadri Appa Rao*, I. L. R., 46 Mad., 190, and *Venkatadri Appa Rao v. Parthasarathi Appa Rao*, I. L. R., 48 Mad., 312, distinguished.

*Rustam Khan v. Janki*, I. L. R., 51 All. ... 101

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- Acts—1908—IX (INDIAN LIMITATION ACT), ARTICLES 134, 140—Mortgage—Reversioner's suit to redeem—Transfer of possession by mortgagee.]** When a mortgagee has transferred possession of the mortgaged property for a valuable consideration a suit to redeem by a plaintiff who at the date when the mortgagee transferred possession had a contingent interest in remainder in the property is governed by article 140, and not by article 134, of the Indian Limitation Act, 1908; the suit consequently is not barred if it is brought within twelve years from the date when the plaintiff's estate falls with possession, even though it is brought more than twelve years after the date of the transfer under which the defendant claims.
- Skinner v. Naunihal Singh, I. L. R., 51 All. ... 367
- Acts—1908—IX (INDIAN LIMITATION ACT), ARTICLES 141, 144, See Hindu law** ... 188
- Acts—1908—IX (LIMITATION ACT), ARTICLES 142 AND 144—Suit for possession of immoveable property based on plaintiff's title—Burden of proof—Adverse possession.]** The article of the Limitation Act applicable to a suit in which the plaintiff sues for possession of immovable property on the basis of his title is article 144, and if in such a suit the plaintiff proves his title he is entitled to a decree, unless the defendant succeeds in establishing his adverse possession for a period of more than twelve years. To cases in which the plaintiff claims relief on the basis of his title article 142 has no application. That article applies to suits in which the plaintiff claims possession of property on the ground that while in possession he was dispossessed or his possession was discontinued by the defendant. In other words that article is restricted to cases in which the relief for possession sought by the plaintiff is based on what may be styled as possessory title.
- There may be cases in which the plaintiff sues for possession of immoveable property both on the ground of title and on the ground of his possession having been disturbed by the defendant. In such cases, if he proves his title the burden of establishing title by adverse possession lies upon the defendant, and if the defendant succeeds in proving that fact the suit must fail, otherwise the plaintiff is entitled to a decree. To this extent article 144 will apply to such a suit. But it may be that the plaintiff, though not able to substantiate his title, is in a position to prove his possession and dispossession by the defendant within twelve years. If that be the case, article 142 will apply and the burden will be on the plaintiff. In short, suits for possession based both on the plaintiff's title and possessory title invite the application of articles 142 and 144, according to the varying circumstances of each case.
- Secretary of State for India v. Chellikani Rama Rao*, I. L. R., 39 Mad. 617, *Jai Chand Bahadur v. Girwar Singh*, I. L. R., 41 All., 669, and *Ali Hammad v. Ghurpattar Singh*, I. L. R., 47 All., 389, followed. *Sita Ram Dube v. Ram Sundar Prasad*, I. L. R., 50 All., 813, and *Kamakhya Narayan Singh v. Ram Raksha Singh*, I. L. R., 7 Pat., 649, distinguished.
- Kanhaiya Lal v. Girwar, I. L. R., 51 All. ... 1042
- Acts—1908—IX (INDIAN LIMITATION ACT), ARTICLES 181, 182(7). See Civil Procedure Code, order XXI, rule 2(1)** ... 237
- Acts—1908—XVI (INDIAN REGISTRATION ACT), SECTIONS 17 AND 49, See Compromise** ... 79



ACTS—1908—XVI (REGISTRATION ACT), SECTIONS 17 AND 49—*Specific performance—Unregistered sale deed—Admissibility in evidence.*] A document which upon its true construction is a sale deed, purporting to transfer an interest in immovable property of the value of Rs. 100 and upwards, is precluded by section 49 of the Indian Registration Act, 1908, from being admitted in evidence in a suit for specific performance of the agreement to transfer said to be contained therein, unless it is registered in accordance with the Act.

*Sanjib Chandra Sanyal v. Santosh Kumar Lahiri*, I. L. R., 49 Cal., 507, *Satyanarayana v. Chinna Venkata Rao*, I. L. R., 49 Mad., 302 and *Ramling Parwatayya v. Bhagwant Sambhuappa*, I. L. R., 50 Bom., 334, approved.

*James Skinner v. R. H. Skinner*, I. L. R., 51 All. ... 771

ACTS—1913—VI (MUSALMAN WAQF VALIDATING ACT) SECTION 3, *See Muhammadan Law* ... 40

ACTS—1913—VII (INDIAN COMPANIES ACT), SECTIONS 169, 171 AND 229—*Secured creditor—Leave to execute mortgage decree—Power of winding-up Judge to refuse leave—Extent of such power—“Rules” (section 229)—Application of insolvency rules in winding-up proceedings—Act No. V of 1920 (Provincial Insolvency Act), sections 28 (6), 33(1) and 44 (2)—Letters Patent, section 10—“Judgement”—Appeal—Power of winding-up Judge to go behind decree—Decrees passed by a court in another province.*] No secured creditor need, or can be forced to, prove his debt, and except that every secured creditor must obtain leave to proceed from the winding-up Judge, such a creditor can stand wholly outside the winding-up proceedings if he so elects and rely upon his security or his decree if he has obtained one.

The winding-up Judge has jurisdiction to refuse leave absolutely, but has not jurisdiction, under colour of refusing leave or otherwise, to annul or modify a secured creditor's security or decree.

While there may be some exceptional case, in which the winding-up Judge may refuse leave absolutely, he should ordinarily refuse leave only for such time as may be necessary to enable him in the particular circumstances of each case to determine whether he will direct the liquidator to pay off the claim and thus save unnecessary costs to the estate, or whether he will give leave to proceed, or whether he will direct the liquidator to take such steps as may be open to him to get the decree set aside.

*Per Boys and KING, JJ.* :—The word “rules” in section 229 of the Indian Companies Act is not to be construed as confined to the meaning given to it by section 3 (47) of the General Clauses Act, X of 1897, but imports the provisions contained in any section of the Provincial Insolvency Act, rules, if any, made under that Act and any appropriate established rules of practice in insolvency proceedings, unless there is something in the Companies Act itself already providing for the matter in question, or in conflict with the rule which it is proposed to import.

[*Per SULAIMAN, A. C. J., and WEIR, J.* :—An order passed by the Judge in winding-up proceedings, refusing leave to a mortgagee decree-holder to execute his decree and in effect directing him to prove the mortgage debt to the satisfaction of the official liquidator, amounts to a “judgement” within the meaning of section 10 of the Letters Patent and an appeal lies from it.



The power which a Judge has, in winding-up proceedings, to go behind a decree obtained by a creditor of the company is not affected by the fact that the decree was passed by a court in another province.]

*In re Union Indian Sugar Mills Co., Ltd., v. Brij Lal*, I. L. R., 49 All., 728, *Ram Lal v. Kashi Charan*, 26 A. L. J., 241, *In re David Lloyd and Co.*, 6 Ch. D., 339, *Kashi Prasad v. Union Bank of India*, I. L. R., 41 All., 432, *In re Van Laun*, [1907] 2 K. B., 23, *Ex parte Bryant*, 1 V. and B., 211, *Ex parte Lennox*, 16 Q. B. D., 315, *Ex parte Kibble*, 17 Ch. App. Cas., 373, *In re Langdendale Cotton Spinning Co.*, 8 Ch. D., 150, *Official Assignee of Calcutta v. Ramratan Das*, I. L. R., 54 Cal., 317, *Wall v. Howard*, I. L. R., 17 All., 438, *Sadiq Ali v. Anwar Ali*, I. L. R., 45 All., 66, and *Hurriah Chunder v. Kali Sundari*, I. L. R., 10 I. A., 4, referred to.

*Hansraj v. The Official Liquidators, Dehra Dun Mussoorie Electric Tramway Company, Limited*, I. L. R., 51 All.

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Act—1913—VII (INDIAN COMPANIES ACT), SECTIONS 207, 215—*Voluntary liquidation—Power of enforcing a call by a suit.*] A liquidator in a voluntary liquidation can enforce a call either by means of an application to the court under section 215 of the Indian Companies Act or by means of a suit. The power to bring such a suit is not taken away by section 215.

In the matter of the Saraswati Trading Corporation, Limited, I. L. R., 51 All. ...

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Acts—1914—VIII (MOTOR VEHICLES ACT), RULES FRAMED BY U. P. GOVERNMENT, RULE 32—*Motor accident—Duty of reporting at police station.*] In rule 32 of the rules framed by the U. P. Government under the Motor Vehicles Act, 1914, the words "if any person is injured" govern the whole of the clause; the duty of reporting an accident at the nearest police station arises, therefore, only if any person is injured.

*Emperor v. Mansa Singh*, I. L. R., 51 All. ...

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Acts—1920—V (PROVINCIAL INSOLVENCY ACT), SECTIONS 4, 53—*Act No. IV of 1882 (Transfer of Property Act), section 53—Jurisdiction—Insolvency court—Fraudulent transfer made more than two years before order of adjudication—Receiver questioning such transfer—Forum of trial.*] A receiver in insolvency having attached a house as the property of the insolvent, a stranger to the insolvency proceedings intervened and claimed to have purchased the house from the insolvent, four years prior to the order of adjudication. The receiver pleaded that the sale deed was fictitious, fraudulent and without consideration. The question arose whether the matter could be tried and decided by the insolvency court, or whether the receiver must seek his remedy by a regular civil suit brought on the basis of section 53 of the Transfer of Property Act.

*Held (per DALAL and KING, JJ., SEN, J., dissenting)* on an interpretation of sections 4 and 53 of the Provincial Insolvency Act, 1920, that an insolvency court can try a question of title raised on the basis of a transfer which took place more than two years prior to the adjudication of the transferor as an insolvent.

Section 53 of the Provincial Insolvency Act, 1920, does not deal with the jurisdiction of the insolvency court, but only lays down certain rules of law affecting those transactions which fall within its scope; it does not control or restrict the jurisdiction conferred upon the court by section 4 to decide all questions of title.

*Per SEN, J.* :—An insolvency court can not try a question of title relating to a transfer which has taken place more than two years before the order of adjudication.

Where the transfer was intended not to be operative from the beginning and the insolvent had remained in possession of the property, the receiver may apply for its annulment. But where the transfer was executed by a proper instrument, was duly registered, and was intended to put the property beyond the reach of the creditors, and a third party is claiming under the transfer, such a transaction cannot be treated as a mere paper transaction. In the latter case, section 53 of the Insolvency Act will apply.

The powers of the insolvency court to adjudicate upon claims as regards third parties are limited and controlled by sections like 53 and 54, and the opening words of section 4,—“subject to the provisions of this Act”—have been deliberately introduced to indicate and define the extent of the jurisdiction which was intended to be conferred upon the court of insolvency.

*Shikri Prasad v. Aziz Ali*, I.L.R., 44 All., 71, *Maharana Kunwar v. E. V. David*, I.L.R., 46 All., 16, *Kamiz Fatima v. Narain Singh*, I. L. R., 49 All., 71, *Hari Chand Rai v. Moti Ram*, I. L. R., 48 All., 414, *Bansidhar v. Kharajit*, I. L. R., 37 All., 65, *The Official Receiver v. Sankaralinga Mudaliar*, I. L. R., 44 Mad., 524, *Dronadula Sriramulu v. Ponakavira*, 45 M. L. J., 105, *Chittammal v. Ponruswami* I. L. R., 49 Mad., 762, *Jokhan Singh v. Deputy Commissioner of Fyzabad*, 23 Indian Cases, 924, *Pita Ram v. Jujhar Singh*, I. L. R., 39 All., 626, *Irshad Husain v. Gopi Nath*, I. L. R., 41 All., 378, *Gaura v. Nawab Abdul Majid*, 64 Indian Cases, 523, *Nilmoni v. Durga Charan*, 22 C. W. N., 704, *Official Receiver of South Arcot v. Perumal Pillai*, 79 Indian Cases, 322, and *Ellis v. Silber*, 8 Ch. App., 88, referred to.

*Anwar Khan v. Muhammad Khan*, I. L. R., 51 All. ... 550

ACTS—1920—V (PROVINCIAL INSOLVENCY ACT), SECTION 28(6), *See Act No. VII of 1913 (Indian Companies Act)*, sections 169, 171, 229 ... 695

ACTS—1920—XIV (CHARITABLE AND RELIGIOUS TRUSTS ACT), SECTIONS 5 AND 6—*Denial of trust—Order holding that trust exists and calling for accounts—Decision whether conclusive as to existence of trust—Subsequent suit for declaration that the property is not held in trust—Jurisdiction.* On an application under section 3 of the Charitable and Religious Trusts Act, 1920, the opposite party denied the existence of the alleged trust. He, however, did not give the undertaking, mentioned in section 5(3), to institute within three months a suit for declaration. The District Judge, after making an inquiry, passed an order holding that there was a trust to which the Act was applicable and directing the opposite party to render accounts. About a month later, the opposite party filed a regular suit for a declaration that the property was his personal property and not subject to any trust to which the Act could apply. On the question whether the suit was maintainable, *held*—

*Per NIAMAT-ULLAH, J.* :—Act XIV of 1920 nowhere provides expressly or impliedly that the order of the District Judge passed under section 5 is conclusive as to the existence of a trust falling within the scope of the Act and cannot be challenged in a regular suit before a court of competent jurisdiction; nor does the order fulfil all the requirements of the rule of *res judicata*, so as to be a bar to the subsequent suit.

If the alleged trustee fails to avail himself of the opportunity given by section 5(3) of the Act to bring a suit before the order is passed by the District Judge, he no doubt subjects himself

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to two disadvantages, namely, (1) that a suit under section 92 of the Civil Procedure Code can be brought against him without the permission of the Advocate-General, and (2) that he becomes bound to submit accounts for the last three years; but it remains open to him to invoke the jurisdiction of a competent court to decide the question of title as to whether he holds the property in his own right or as a trustee of a trust within the scope of the Act.

*Per* MUKERJI, J.:—The maintenance of a suit so as to nullify the effect of section 6 of the Act is not permissible.

The Act offers an ample chance, before the order is passed by the District Judge, for a regular suit being instituted for the determination of the question whether the property is or is not trust property; but if this opportunity is not availed of and an adverse order is passed by the District Judge, the result is that a non-compliance with it is, by section 6, deemed to be a breach of trust. If, thereafter, the subsequent suit is successful, the result would be two conflicting positions.

Mahadeo Bharthi v. Mahadeo Rai, I. L. R., 51 All. ... 805

Acts—1920—XIV (CHARITABLE AND RELIGIOUS TRUSTS ACT), SECTION 7—*Application by trustee for permission to sell—Order directing sale to one of two rival would-be purchasers—Revision—Civil Procedure Code, section 115—"Case decided"—"Court."*] A District Judge exercising powers under Act XIV of 1920 acts as a court, which is subordinate to the High Court, and his acts are subject to the revisional jurisdiction of the High Court. When a trustee applies under section 7 of the Act to obtain advice or direction of the District Judge, a "case" is presented for his decision, and the decision amounts to a "case decided" within the meaning of section 115 of the Civil Procedure Code.

The fact that there is no compulsion on the trustee to act in accordance with the advice or direction given by the Judge under section 7 is no ground for the High Court refusing to correct such advice or direction in the exercise of its revisional powers.

Unless the Judge has acted illegally or with material irregularity in the exercise of his jurisdiction the High Court will not interfere in revision to correct a mere error of judgement. *Balakrishna Udayar v. Vasudeva Ayyar*, I. L. R. 40 Mad., 793, followed.

Abdul Wahid Khan v. Radha Kishen, I. L. R., 51 All. ... 957

Acts—1925—XIX (PROVIDENT FUNDS ACT), SECTIONS 2 AND 3(1)—*Provident Funds Rules, rule 10—Authority of rules—Provident Funds deposit—Attachment after retirement—Civil Procedure Code, section 60(k)—Government of India Act, 1919, section 96B, clause (4).]* Money lying to the credit of a retired Government servant in the General Provident Fund is not liable to attachment in execution of a decree against him.

Rule 10 of the General Provident Fund rules is merely a rule of procedure for the Accounts Officer and does not legalize an attachment or authorize the Accounts Officer to comply with a notice of attachment. The rule can have no statutory authority to override the provisions of the Provident Funds Act, 1925, or of section 60(k) of the Civil Procedure Code.

*Veerchand Nowla v. B. B. and C. I. Railway Company*, I. L. R., 29 Bom., 259, *Hindley v. Jounarain Marwari*, I. L. R., 46 Cal., 962, and *Secretary of State for India v. Rai Kumar Mukherjee*, I. L. R., 50 Cal., 347, referred to. *Devi Prasad v. Secretary of State for India in Council*, I. L. R., 45 All., 554 and *Jagannath v. Tara Prasanna*, I. L. R., 3 Pat., 74, followed

*Secretary of State for India in Council v. Har Charan Das*, I. L. R., 51 All. ... 845

ACTS—1926—XXXVIII (BAR COUNCILS ACT), SECTIONS 2, 8, 10 and 19—*Letters Patent, section 8—Vakil—Disciplinary action of High Court—Procedure.*] As and from June 1, 1928, the procedure by which an advocate can be called upon to answer for misconduct is governed by section 10 and the following sections of the Bar Councils Act, 1926. To proceed under section 10, the High Court is required by sub-section (2) of that section, if it does not summarily reject the complaint, either to refer the case for inquiry to the Bar Council, or after consultation with the Bar Council, to refer it to the court of a District Judge. Similar powers of reference are given where the Court, instead of acting on a complaint, acts on its own motion. But, in either event, it is necessary for the case to be either referred to the Bar Council, or at any rate for the Bar Council to be consulted.

In the matter of a Vakil of Azamgarh, I. L. R., 51 All.

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ACTS (LOCAL)—1901—II (AGRA TENANCY ACT), SECTION 10—*Exproprietary rights, accrual of—“Transfer by sale in execution of a decree or order.”—Foreclosure of mortgage by conditional sale is not such transfer.*] According to the language of section 10 of the Agra Tenancy Act of 1901 there must be either a sale in execution of a decree or order, or there must be a voluntary alienation, for the purpose of accrual of exproprietary rights. Foreclosure of a mortgage by conditional sale, though it is effected by a decree of court, is neither a sale in execution nor a voluntary alienation, and therefore no exproprietary rights can accrue upon the foreclosure.

Paras Ram Singh v. Raj Kumar Singh, I. L. R., 51 All.

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ACTS (LOCAL)—1901—II (AGRA TENANCY ACT), SECTIONS 95 AND 167—*Jurisdiction—Civil and revenue courts—Relinquishment of occupancy tenure by a widow in a Hindu family—Suit by members of family against zamindar and widow for declaration that widow had no title and the relinquishment was void—Declaratory decree—Discretion.*] The plaintiffs brought a suit in a civil court, alleging themselves to be the occupancy tenants of the defendant No. 2 (the zamindar) in respect of a certain holding, and asking for a declaration that the defendant No. 1, a widow of the plaintiffs' family, in whose name the holding was recorded, had no concern with it and a deed of relinquishment executed by her in favour of the zamindar was null and void and not binding on the plaintiffs. The zamindar alone contested the suit and raised, *inter alia*, the plea of jurisdiction.

Held by SULAIMAN, A. C. J., and MUKERJI, J., (BENNET, J., dissenting) that the cognizance of the suit by the civil court was barred by section 167 of the Agra Tenancy Act (II of 1901). For the purpose of that section it was essential to look at the substance and real object of the suit and not merely the form of the relief asked for. The nature of the dispute was such that substantial relief could be given and the dispute effectively disposed of by the revenue court in a properly framed suit, namely a suit under section 95 of the Tenancy Act, which, as the plaintiffs alleged themselves to be the tenants of the defendant zamindar, they could have brought in the revenue court.

Until the plaintiffs established, as against the zamindar, their status as occupancy tenants the declaration sought by them could not be granted; and as it would, in the circumstances, be a *erutum fulmen* even if it were granted, the court should in its discretion refuse to grant it.

Dori Lal v. Sardar Singh, 5 A. L. J., 514, Birham Khushal v. Sumera, I. L. R., 35 All., 299, Ram Charitra v. Jinsi Ahirin, I. L. R., 36 All., 48, Jagannath v. Balwant Singh, I. L. R., 44

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All., 692, and *Badri Kasaundhan v. Sarju Misr*, I. L. R., 36 All., 55, referred to.

*Per BENNET, J.* :—As the plaint asked only for a declaration, under section 39 of the Specific Relief Act, in regard to a document and not a declaration about legal status under section 42 of that Act, and as there was neither a suit pending in, nor a prior decree of, the revenue court in regard to the matter in suit, and the plaintiffs were in cultivating possession, the suit was cognizable by the civil court, which was the proper court in which such a declaratory suit was to be brought.

The declaration, if granted, would be of use to the plaintiffs in the revenue court, as they would then be able to apply for revision of the order passed by the Collector, under section 40 of Act III of 1901, altering the Khatauni on the basis of the relinquishment.

*Suba Bibi v. Raghubir Singh*, 7 A. L. J., 291, *Ramdhari Rai v. Ramdhari Rai*, 7 A. L. J., 305, *Chhote Lal v. Sheopal Singh*, I. L. R., 33 All., 335, *Jaigopal Narain Singh v. Uman Dat*, 8 A. L. J., 695, *Brij Kumar Lal v. Sheo Kumar*, I. L. R., 37 All., 444 and *Fateh Singh v. Gopal Narain*, I. L. R., 48 All., 88, referred to.

*Misri Lal v. Gopi Charan*, I. L. R., 51 All. ... 114

ACTS (LOCAL)—1901—II (AGRA TENANCY ACT), SECTION 146—*Distraint—Misappropriation of crops—Suit for compensation—Jurisdiction—Civil and revenue courts.*] A suit by a tenant for recovery of the value of crops, on the allegations that the landlord had distrained and then misappropriated them and had thereafter obtained a decree for the arrears and realized it from the tenant by execution, is not a suit within the purview of section 146 of the Agra Tenancy Act, 1901, and is cognizable by the civil court.

*Johari Mal v. Balmakund*, I. L. R. 51 All. ... 926

ACTS (LOCAL)—1901—II (AGRA TENANCY ACT), SECTIONS 159 AND 160, *See Jurisdiction* ... 897

ACTS (LOCAL)—1901—II (AGRA TENANCY ACT), SECTIONS 163, 164—Duty of Lamhardar to divide profits on dates prescribed, *See Civil Procedure Code*, order I, rule 1 ... 994

ACT (LOCAL)—1901—III (U. P. LAND REVENUE ACT), SECTIONS 32, 42, 44, *See Appeal to Privy Council* ... 359

ACTS (LOCAL)—1901—III (LAND REVENUE ACT), SECTIONS 175, 233 (1)—*Applicable to taxes realizable as land revenue—Income-tax—Sale for realization—Suit for setting aside sale on the ground of fraud.*] Section 233 (1) of the Land Revenue Act covers the case of a sale of immovable property for realization of taxes and dues which are recoverable as if they were arrears of land revenue. Accordingly, a suit to set aside on the ground of fraud a sale of immovable property for the realization of income-tax and irrigation dues is maintainable.

*Chandu Mal v. Darbari Lal*, I. L. R., 51 All. ... 981

ACTS (LOCAL)—1903—II (BUNDELKHAND ALIENATION OF LAND ACT), SECTIONS 9, 10, 16(1) AND 22—*Mortgage by conditional sale after Act—Parties not then belonging to "agricultural tribes"—Subsequent notification declaring them members of "agricultural tribes"—Remedies of such mortgagee—Civil Procedure Code, sections 105(2) and 151—Question of law wrongly decided in order of remand—Not appealed—Inherent power to remedy injustice.*] After the Bundelkhand Alienation of Land Act, 1903, came into force a mortgage by conditional sale was executed between parties who at that time were not included in the "agricultural tribes"

declared under section 4 of the Act. Later, by notification under section 4, the list of "agricultural tribes" was extended, as a result of which the parties were classed as members of the same agricultural tribe. Subsequently the mortgagee sued upon his mortgage and the Munsif held that by virtue of section 10 of the Act the condition as to foreclosure was void and that consequently the mortgage itself fell through, and he dismissed the suit. On appeal the District Judge agreed that section 10 applied, but holding that the effect thereof was no more than to convert the mortgage into a simple mortgage, remanded the case to the Munsif. The Munsif then found what sum was due on the mortgage and referred the case to the Collector under section 9(3). The Collector held that section 9 was not applicable at all, as the mortgagor was not a member of an agricultural tribe at the date of the mortgage and this view was, finally, upheld by the Board of Revenue. The Munsif then again took up the case and passed a decree for sale. On appeal the District Judge held that section 16 of the Act applied and he set aside the decree for sale and dismissed the suit. On appeal to the High Court, *held*—

*Per Boys, J. :—*

(1) The mortgage in question, regarded as only a simple mortgage as held by the unappealed order of remand, must, according to the decision of the majority in the Full Bench case of *Ram Sahai Singh v. Debi Din*, I. L. R., 49 All., 8, be held not to come under section 9 of the Bundelkhand Alienation of Land Act; and, upon a consideration of the scheme and intention of the Act, section 16 was not applicable to a mortgage which did not come within sections 6 and 9, i.e., within the scope of the Act and the mischief contemplated by it; therefore, the mortgagee would be entitled, upon the simple mortgage, to a decree for sale.

(2) Also, exactly the same reasoning which applied to exclude section 16 from operation to a mortgage not within the scope of the mischief aimed at by the Act applied to exclude the operation of section 10; the mortgage, as a mortgage by conditional sale, was therefore not invalid; and although no party appealed from the remand order holding the foreclosure clause to be illegal, the High Court had power, in the circumstances of the case, under section 151 of the Civil Procedure Code to reverse that view and hold the mortgage to be a valid mortgage by conditional sale and grant a decree for foreclosure.

(3) It was impossible to conceive that section 16 was intended to apply to cases where the legislature was not giving the mortgagee any other remedy, which it considered to be an equitable equivalent, by the Act.

*Per ASHWORTH, J. :—*

(1) A notification under section 4, declaring certain classes of persons to be agricultural tribes, must be deemed to have retrospective effect and, therefore, the mortgage in question must be regarded as made by a member of an agricultural tribe.

(2) If the Collector decided that he had no jurisdiction to act under section 9(1) and revise a mortgage, his decision could not, under section 22, be questioned by a civil court. Also, according to the majority decision in the case of *Ram Sahai Singh* section 9 did not refer to a mortgage executed by one agriculturist in favour of another and, therefore, it did not refer to the mortgage in question.

(3) As the legislature could not have intended to deprive a mortgage between two agriculturists of all effect, the logical consequence was that not only section 9 but no section of the Act

applied to such a mortgage : hence section 10 did not apply and the mortgagee was entitled to a decree for foreclosure. A decree for sale was clearly barred by section 67(a) of the Transfer of Property Act.

(4) It would lead to an impossible situation if by section 105(2) of the Civil Procedure Code a High Court were, in an appeal from a decree, to be debarred from taking on a law point a different view from that taken by the District Judge in an interlocutory order. Section 151 was wide enough to prevent such an *impasse*.

Kalika Prasad v. Ajudhia Prasad, I. L. R., 51 All. ... 780

ACTS (LOCAL)—1910—IV (U. P. EXCISE ACT), SECTIONS 60(a) AND 71—*"Possession"*—*House occupied by several persons—Nature of occupation—"Actual offender"—Exemption from imprisonment.*] Under section 60(a) of the U. P. Excise Act, IV of 1910, ownership of the house is not an essential element, but the nature of the occupation of the house is often a circumstance of great importance in estimating whether the particular accused was in possession of the excisable article.

Cocaine was found in a *degchi*, into which it had been recently thrown, in a house in which two brothers and a cousin, who carried on a common business, lived together. All three were in the room when the cocaine was found, and all of them tried to account for its presence by the false allegation that they saw a constable throw it into the *degchi*. *Held* that each of the three persons came within section 60(a), as being in possession of the cocaine.

The proviso in section 71 of the Act does not in any way modify the effect of section 60(a), which provides that a person in possession of cocaine may be punished with imprisonment which may extend to two years. The proviso as to punishment by fine applies only to that person who is able to show that he is the employer or principal, that he did not personally commit the act complained of and that he took all due and reasonable precaution to prevent the commission of such act by the employee or agent. *Abdul Rahman v. Emperor*, 26 A. L. J., 414, distinguished.

Emperor v. Ismail, I. L. R., 51 All. ... 747

ACTS (LOCAL)—1910—IV (UNITED PROVINCES EXCISE ACT)—Rules 80, 82, 86 of the *Excise Manual—Act No. IX of 1872 (Contract Act)*, section 23—*Contract between licensee and stranger to share profits and losses of the liquor business—Partnership—"Transfer or sub-lease of license."*] Where an agreement is entered into between a licensee and a third person, in consideration of money contributed by the latter, and the parties agree to share the profits and losses arising from the liquor business, the transaction does not amount to a transfer or sub-lease of the license or the liquor contract. Such an agreement does not contravene rules 80, 82 and 86 of the United Provinces Excise Manual or section 23 of the Indian Contract Act.

Radhey Shiam v. Mewa Lal, I. L. R., 51 All. ... 506

ACTS (LOCAL)—1912—I (U. P. ARBITRATION AMENDMENT ACT), SECTION 2, *See Arbitration* ... 874

ACTS (LOCAL)—1916—II (U. P. MUNICIPALITIES ACT), SECTION 178(2)—*"Adjacent to" a public street, meaning of—Building divided from public road by a wall and a canal distributory.*] A building which is divided from a public road by a wall and a canal distributory is not "adjacent to" a public road within the meaning of section 178(2) of the U. P. Municipalities Act. "Adjacent" must mean "joining at some point" and cannot mean to include two properties which are divided.

Emperor v. Bhan Deb, I. L. R., 51 All. ... 463



- ACTS (LOCAL)—1922—X (U. P. DISTRICT BOARDS ACT), SECTION 34 ... 864
- ACTS (LOCAL)—1922—XI (AGRA PRE-EMPTION ACT), SECTIONS 3, AND 5—*Custom of pre-emption recorded in two out of three mahals formed by partition of a village—Presumption.*] A village was divided into three mahals; a custom of pre-emption was recorded in two mahals and in the third mahal, in which the vended property was situated, the *wajib-ul-arz* did not record any custom of pre-emption and simply stated that it was owned by a single proprietor. *Held*, in the absence of any *wajib-ul-arz* of the village prior to partition, it could not be presumed that the *wajib-ul-arz* of the parent mahal must have recorded a similar right. *Zalim Singh v. Raghunandan*, I. L. R., 51 All. ... 604
- ACTS (LOCAL)—1922—XI (AGRA PRE-EMPTION ACT), SECTIONS 4 AND 11—*Superior and Inferior proprietors—"Co-sharers"—Sale of rights of superior proprietor in entire mahal—Not capable of being pre-empted by an inferior proprietor of a share in mahal.*] The entire rights of the superior proprietor in respect of the whole 20 biswas of a village being sold, an inferior proprietor of a share in the 20 biswas sued for pre-emption. In this village the Government revenue was settled with the inferior proprietors, who alone could let out the lands to tenants and collect rents, and who were bound to pay a fixed sum to the superior proprietor as *malikana* allowance. *Held* that the rights of the superior proprietor and the rights of the body of inferior proprietors were quite different and distinct in character and the plaintiff was in no sense a co-sharer of the vendor in the right transferred by him. The vendor could not be called a person entitled as proprietor to a share or part in the mahal as referred to in section 4 of the *Agra Pre-emption Act*; the mere right to receive *malikana* allowance was not an interest of a co-sharer in a part of the mahal. The sale was, therefore, not pre-emptible. *Abdul Wahid v. Halima Khatun*, I. L. R., 42 All., 262, applied. *Sakina Begam v. Harnam Singh*, I. L. R., 51 All. ... 971
- ACTS (LOCAL)—1922—XI (AGRA PRE-EMPTION ACT), SECTIONS 4(1) AND 20—"Co-sharer"—*Indefeasible interest—Full proprietary title necessary—Estoppel—Invalid transfer together with estoppel does not confer proprietary title.*] For a person to become a co-sharer within the meaning of section 4(1) of the *Agra Pre-emption Act* it is necessary that he should be entitled as proprietor to a share in the mahal. A right short of proprietary title will not do; nor can a person in adverse possession without actual title be said to be entitled as proprietor to the property in his possession so long as his title has not matured by prescription. The expression "indefeasible interest" in section 20 of the *Agra Pre-emption Act* also refers to full proprietary title which is not liable to be defeated. An oral gift of immovable property by a Hindu widow, followed by the donee's possession, even if supplemented by circumstances creating an estoppel against the reversioners' challenging the validity of the gift, will not, unless the possession has been for twelve years, vest any proprietary title in the donee. *Fateh Singh v. Thakur Rukmini Ramanji Maharaj*, I. L. R., 45 All., 389, distinguished. *Bachchi Lal v. Debi Din*, I. L. R., 51 All. ... 629
- ACTS (LOCAL)—1922—XI (AGRA PRE-EMPTION ACT), SECTIONS 4(3), 11 AND 12—*Sale of an isolated plot—Pre-emptible by a co-sharer in the mahal—Sale of a site of a building not exempted from the operation of the Act.*] A right of pre-emption accrues in favour of co-sharers in the mahal even when a petty proprietary interest is transferred.



Land covered by buildings is not exempt from the operation of the Act and is liable to be pre-empted.

Jamna Prasad v. Muhammad Zahir-uddin, I. L. R., 51 All. ... 658

ACTS (LOCAL)—1922—XI (AGRA PRE-EMPTION ACT), SECTIONS 4(10), 6 AND 11—“Sale”—*Sale effected by court under order XXI, rule 34, C. P. C.—Pre-emption—Failure by defendants to claim right of pre-emption in suit for specific performance of contract of sale—Constructive res judicata.*] A sale effected by means of a sale deed executed by a court under order XXI, rule 34, Civil Procedure Code, in pursuance of a decree for specific performance of a contract to sell, is a sale within the meaning of section 11 of the Agra Pre-emption Act, so that a suit for pre-emption can lie in respect of it. Such a sale is not one “in execution of a decree” and does not come within the exception to section 6.

Where a suit was brought to pre-empt such a sale, by persons who had been arrayed as defendants in the suit for specific performance which culminated in that sale, the fact that they did not in that suit assert a right of pre-emption was held not to operate by way of constructive *res judicata* to bar their suit for pre-emption, inasmuch as a right of pre-emption can accrue only after the sale has taken place.

Lal Chand v. Ram Chandar, I. L. R., 51 All. ... 842

ACTS (LOCAL)—1922—XI (AGRA PRE-EMPTION ACT), SECTIONS 5, 14 AND 15—*Ambiguous entry of right of pre-emption—“Refusal to purchase”—Estoppel by conduct.*] Section 5 of the Agra Pre-emption Act is mandatory and its object is not to find out the particulars or the incidents of the rule of pre-emption but to lay down the test as to whether a rule of pre-emption should be held applicable to the village or not. However vague the rule may be and in whatever imperfect form it may be recorded, if it amounts to a declaration recognizing the right of pre-emption, it would fulfil the conditions required by section 5. Once a right of pre-emption is deemed to exist, the rule of pre-emption embodied in section 12 will prevail.

Sections 14 and 15 of the Agra Pre-emption Act are not exhaustive and do not lay down the only rule of estoppel which can operate in pre-emption cases. A waiver of the right of pre-emption can also be inferred from a clear, unambiguous and absolute refusal to purchase. So, where the plaintiff, on being asked by the vendor to purchase the property on certain terms, refused, saying he had no money and could not raise it even by borrowing, but said nothing about reserving his future right of pre-emption, and a few days later the property was sold to a third person without giving any previous intimation of the sale and its terms to the plaintiff, it was held that the plaintiff was estopped from claiming to pre-empt the sale. *Subhaqi v. Muhammad Ishak*, I. L. R., 6 All., 468. *Kanhai Lal v. Kalka Prasad*, I. L. R., 27 All., 670 and *Munawar Husain v. Khadim Ali*, 5 A. L. J. 331, not approved. *Naunihal Singh v. Ram Ratan*, I. L. R., 39 All., 127, *Nathi Lal v. Dhani Ram*, 15 A. L. J., 315 and *Shamsher Singh v. Piari Dat*, I. L. R., 40 All., 690, distinguished. *Ranjit Singh v. Bhagwati Singh* I. L. R., 48 All., 491, approved.

Rameshar Prasad v. Ghisiawan Prasad, I. L. R., 51 All. 820

ACTS (LOCAL)—1922—XI (AGRA PRE-EMPTION ACT), SECTION 3(c)—“Purposes of a manufacturing industry”—*Cultivation of sugarcane is not a “purpose of a manufacturing industry”—Recital of purpose in the sale deed not necessary.*] Purchase of land by a sugar manufacturing factory for the purpose of cultivation of sugarcane

crops to be used as raw material for the factory is not a purchase "for the purposes of a manufacturing industry" within the meaning of section 8(c) of the Agra Pre-emption Act. Sugarcane growing is an agricultural pursuit quite separate and independent from the industry of manufacturing sugar. No doubt it is raw material required by a sugar factory, but the production of such raw material by agriculture is not part of the business of a manufacturer and is not a purpose of a manufacturing industry.

It is not necessary, in order that section 8(c) may be applicable, that the purpose of the purchase should be expressly mentioned in the sale deed.

[*Per PULLAN, J.*—But, at the same time, in view of the use of the word "ostensibly" in the last line of clause (c) of section 8, it would appear that the purchaser is bound in some way to let the purpose of the purchase be known, if he intends to take the benefit of section 8, clause (c).]

Punjab Sugar Mills Co. v. Lachhman Prasad, I. L. R., 51. ... 1045

ACTS (LOCAL)—1922—XI (AGRA PRE-EMPTION ACT), SECTION 12—*Pre-emption—Holders of specific plots of muafi lands—Wajib-ul-arz recording custom of pre-emption but negating right of holders of muafi lands.* When a right of pre-emption is recorded in a *wajib-ul-arz* of the mahal, the question as to what persons are entitled to exercise the right is to be determined by reference to section 12 of the Act and not to the recitals in the *wajib-ul-arz*. Where a *wajib-ul-arz*, framed before the Agra Pre-emption Act, recorded a custom of pre-emption but there was a recital in it to the effect that holders of resumed *muafi* lands were not co-sharers and not entitled to pre-empt, it was held that such persons were entitled, under section 12 of the Act, to pre-empt a sale of resumed *muafi* land in which they were coparceners. ... 594

Lalta Prasad v. Chunni Singh, I. L. R., 51 All. ... 594

ACTS (LOCAL)—1922—XI (AGRA PRE-EMPTION ACT), SECTION 12 (3)—*"Descended from common ancestor"*—Sale by Hindu widow—*Pre-emption by her husband's brother.* Upon a sale by a Hindu widow of property which she has inherited from her husband, her husband's brother has no preferential claim of pre-emption under section 12, clause (3) of the Agra Pre-emption Act, because he and the vendor, i.e., the widow, are not descended from a common ancestor. Descent from a common ancestor of the vendor's husband does not make the section applicable. ... 872

Mauji v. Bhagole, I. L. R., 51 All. ... 872

ACTS (LOCAL)—1922—XI (AGRA PRE-EMPTION ACT), SECTIONS 13, 19 AND 20—*Rival pre-emptors' suits—Preference inter se—Acquisition of equal rights by all the pre-emptors before the date of the decree—Property to be divided equally between them.* Two suits to pre-empt the same property were brought, one by R and another by S. In each suit the rival pre-emptor was impleaded as a *pro forma* defendant. As between R and S, R had a preferential claim. But during the pendency of the suits, which were consolidated, S acquired a certain share and became a pre-emptor of the same rank as R, so that at the time when the decree came to be passed there was no preference as between them. Held, they were entitled to share the property equally between them, and R could not get the whole.

Section 13 of the Agra Pre-emption Act, in laying down that where two or more persons claiming pre-emption are equally entitled to pre-emption the property shall be equally divided

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between them, uses the present tense and not the past tense. That section can not be interpreted to mean that they must have been equally entitled to pre-emption on the date of the sale deed, the true criterion being whether they were equally entitled on the date of the decree. *Ram Saran Das v. Bhagwat Prasad*, I. L. R., 51 All., 411, applied.

*Ram Raj Tewari v. Sheoraj Saithwar*, I. L. R., 51 All. ... 968

ACTS (LOCAL)—1922—XI (AGRA PRE-EMPTION ACT), SECTIONS 14 AND 15—*Notice to pre-emptors—Service of notice necessary.*] Under section 14 of the Agra Pre-emption Act it is not enough that a notice by registered post is sent to the persons having a right of pre-emption, but service of the notice on such persons is essential. The use of the word "issue" in section 15 is ambiguous, but reading the whole of that section leaves no doubt that service on the pre-emptors is essential.

*Suraj Mal v. Shankar*, I. L. R., 51 All. ... 885

ACTS (LOCAL)—1922—XI (AGRA PRE-EMPTION ACT), SECTION 19—*Ex parte decree for pre-emption—Set aside under order IX, rule 13—Acquisition thereafter by defendant of a share in the village—Plaintiff's right not defeated thereby.*] An *ex parte* decree, even though it has subsequently been set aside by the court under order IX, rule 13, of the Civil Procedure Code, is within the scope of the clause "where a decree for pre-emption has been passed" in section 19 of the Agra Pre-emption Act. Where, after the *ex parte* decree had been set aside the defendant vendee obtained by gift a share in the village, the plaintiff's right to a decree for pre-emption could not be defeated thereby, inasmuch as a decree, though *ex parte*, for pre-emption had actually been passed before the defendant's acquisition of the status of a co-sharer.

*Gurdial Singh v. Arjun Singh*, I. L. R., 51 All., ... 892

ACTS (LOCAL)—1922—XI (AGRA PRE-EMPTION ACT), SECTIONS 19 AND 20—*Indefeasible interest—Vendee obtaining before decree a gift from the father of a joint Hindu family—Interest not being indefeasible does not defeat pre-emption.*] A vendee who has, during the pendency of a suit for pre-emption, become a co-sharer by virtue of having acquired an interest in the mahal cannot defeat the claim for pre-emption unless the interest acquired by him is an indefeasible interest.

A gift to a stranger of joint family property by a Hindu father is *prima facie* invalid, and can not be said to confer an indefeasible interest, in the absence of proof of validating circumstances or of consent by the sons.

Although the word "indefeasible" cannot be taken in its widest sense so as to exclude transactions which have a possibility of being challenged, for instance on grounds of undue influence, fraud, coercion etc., it undoubtedly means that on the obvious facts the transaction must confer a valid title on the transferee.

*Ram Saran Das v. Bhagwat Prasad*, I. L. R., 51 All., 411 and *Deo Narain Singh v. Ajudhia Prasad*, I. L. R., 49 All., 696, referred to.

*Govind Singh v. Manglu*, I. L. R., 51 All. ... 990

ACT (LOCAL)—1922—XI (AGRA PRE-EMPTION ACT), SECTIONS 19, 20—*Pre-emption—Vendee becoming co-sharer after suit and before decree—Defeatance of plaintiff's suit—Marginal notes to sections of Act—Authority thereof—Interpretation of Statute.*

Under the provisions of section 19 of the Agra Pre-emption Act, 1922, a defendant vendee can, by obtaining a gift to himself of a share in the mahal subsequent to the institution of the suit and prior to the passing of the decree, defeat the plaintiff's right to a decree for pre-emption.

Section 20 of the Act is not concerned with the effect of the acquisition of interest subsequent to the date of the suit, but applies only to such acquisition before the institution of the suit.

Marginal notes to sections of an Act can be referred to for the purpose of interpretation if they can be regarded as inserted by, or under the authority of, or assented to by the legislature.

The marginal notes to the sections of the Agra Pre-emption Act, 1922, are to be regarded as inserted in the Act with the assent and authority of the Legislative Council, and can be referred to for the purpose of interpreting the sections.

*Qudrat-un-nissa Bibi v. Abdul Rashid*, I. L. R., 48 All., 616,  
*Haji Sultan v. Masitu*, I. L. R., 48 All., 689, *Ram Khelawan v. Bankay Bihari*, I. L. R., 49 All., 268, *Deo Narain Singh v. Ajudhia Prasad*, I. L. R., 49 All., 696 and *Bhagwan Sahai v. Nanak Chand*, I. L. R., 49 All., 516, referred to. *Claydon v. Green*, L. R., 3 C. P., 511 and *Balraj Kunwar v. Jagatpal Singh*, I. L. R., 26 All., 393, distinguished.

*Ram Saran Das v. Bhagwat Prasad*, I. L. R., 51 All. ... 411

ACTS (LOCAL)—1923—I (BUNDELKHAND ENCUMBERED ESTATES ACT)  
 SECTION 10—Waqf, *See* Muhammadan law ... 40

ACTS (LOCAL)—1926—III (AGRA TENANCY ACT), SECTION 45—  
 Relief against agricultural lessee holding under a voidable lease,  
*See* Joint Hindu family ... 285

ACTS (LOCAL)—1926—III (AGRA TENANCY ACT), SECTIONS 99, 121 AND  
 230—*Suit between co-tenants for declaration and joint possession—Jurisdiction—Civil and Revenue courts.*] A suit for a declaration that the plaintiff, jointly with the defendants, is a co-tenant of a certain holding, and for joint possession thereof, is cognizable by the revenue court and not by the civil court.

So far as the suit is one for the declaration claimed, it falls within section 121 of the Agra Tenancy Act, 1926, inasmuch as the defendants, who are admittedly tenants, are persons claiming to hold through the landholder. Regarding the relief for possession the suit falls within the scope of section 99, for the same reason. It is not necessary, for the purpose of those sections, that the defendants must set up a case of a special grant by or special contract with the landholder, or a subsequent recognition by him of their title, coupled with a denial of the plaintiff's title.

A suit falling under section 99, and a suit falling under section 121, being specified in the fourth schedule of the Act, section 230 bars the cognizance of the present suit by the civil court.

*Ram Partab v. Chhotey Lal*, 26 A. L. J., 431, followed.  
*Sahdeo v. Budhai*, I. L. R., 51 All. ... 853

ACTS (LOCAL)—1926—III (AGRA TENANCY ACT), SECTION 253—*Revision by High Court—“Subordinate revenue court” does not include District Judge—High Court can not revise orders of District Judge—Civil Procedure Code. section 115 not applicable.*]

The High Court has no power of revision, in matters under the Agra Tenancy Act, except under section 253 of that Act; the provisions of section 115 of the Civil Procedure Code are not applicable.

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The expression "subordinate revenue court" in section 253 means only a first revenue court of original jurisdiction and does not include the court of a District Judge hearing an appeal from the former court. Therefore, the High Court has not got any power of revision over orders passed by the District Judge, however *ultra vires* or illegal they may be; but if the order passed by the trial court be open to objection it may be revised.

Jagdeo Singh v. Kesho Prasad Singh, I. L. R., 51 All. 1020

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APPEAL TO PRIVY COUNCIL—*Competence of appeal—Order of Board of Revenue—Thekadar—Dispute as to entry in register—Dispute as to tenure in course of proceedings—Land Revenue Act (U. P. Act III of 1901), sections 32, 42, 44.* A thekadar, registered under the United Provinces Land Revenue Act, 1901, purported to transfer his theka to his son and grandson, who applied for mutation of names. The superior proprietor, being given notice, objected that the theka had been forfeited by the transfer, and that the transferees were merely tenants. The Assistant Collector upheld that contention. The transferor thereupon brought a civil suit against the transferees and obtained a decree by consent that the gift was incomplete and passed no title. He then appealed in the mutation proceedings, and eventually the Board of Revenue ordered therein that the transferor should be re-entered as thekadar. The superior proprietor appealed to the Privy Council.

*Held*, that the appeal did not lie. A thekadar being a "proprietor" within the meaning of section 32, the dispute was one as to an entry in the register maintained under section 32(a), and while by section 44 the decision did not bar a civil suit, no appeal to the Privy Council was given. The dispute not being under section 32(e) it was not necessary to decide whether section 42, which provides that the Code of Civil Procedure shall apply to the trial of particular disputes within section 32(e), had in those disputes the effect of giving a right of appeal under the Code.

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<p>ARBITRATION—<i>Agreement to refer future differences</i>—Act No. IX of 1899 (Indian Arbitration Act), section 19—Act (Local) No. I of 1912 (U. P. Arbitration Amendment Act), section 2—"Submission"—<i>An abortive arbitration resulting in an invalid award does not exhaust agreement to refer.</i>] The U. P. Arbitration (Amendment) Act, 1912, section 2 of which modifies the definition of a "submission" as contained in the Indian Arbitration Act, has no application to an agreement to refer to arbitration, which was alleged to have been executed at Cawnpore, to which the Indian Arbitration Act applied, and which provided that the arbitration was to be made in Calcutta by two European merchants of that place.</p> <p>An arbitration ending in an award which is set aside as being invalid is an abortive arbitration, and the agreement to refer is not exhausted thereby.</p>	
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<p>ARBITRATION—<i>Supersession before award</i>—Revision—Civil Procedure Code, sections 115 and 151—"Case decided"—<i>Inherent power to supersede a reference to arbitration—Interference not barred by possibility of relief subsequently under section 105 (1).</i>] The word "case" in section 115 of the Civil Procedure Code does not necessarily mean a suit, but can mean a proceeding. If any proceeding in a suit has terminated, it is certainly a case decided within the meaning of section 115 although the suit itself has not been finally disposed of. Where, after a reference to arbitration, an application for supersession is made, the order superseding and terminating the reference amounts to an order deciding a case and is open to revision.</p> <p>There is no express provision which empowers a court to supersede an arbitration on grounds other than those mentioned in schedule II of the Civil Procedure Code. But there is an inherent jurisdiction in a court to intervene and supersede the arbitration if the case falls under section 151 of the Code, viz., where such an order is urgently necessary for the ends of justice and to prevent some irreparable injury to the party, or to prevent the abuse of the process of the court.</p> <p>The mere fact that the aggrieved party might have a right to challenge the order of supersession under section 105 (1) subsequently, in an appeal from the decree finally passed, does not debar interference at this stage so as to prevent an unnecessary waste of time and of expenses in recording evidence.</p> <p>Where the court has superseded the reference merely on the ground that one of the parties thereto has an apprehension that he would not be fairly treated, but has not recorded any finding that in its own opinion there was apprehension that justice would not be done and that its immediate intervention was called for, the court has not applied its mind to the extent of its own jurisdiction and has acted, if not actually without jurisdiction, certainly with material irregularity in the exercise of its jurisdiction.</p>	
Buddhu Lal v. Mewa Ram, I. L. R., 43 All., 564, and Ram Sarup v. Gaya Prasad, I. L. R., 48 All., 175, referred to. Chatarbhuj v. Raghubar Dayal, I. L. R., 36 All., 354, followed.	
Bhola Nath v. Raghunath Das Mithan Lal, I. L. R., 51 All. ... ..	1010

**ARBITRATION BY COURT—Review of judgement—Jurisdiction—Civil Procedure Code, schedule II, paragraph 14.]** Parties to a suit before a Munsif agreed that the Munsif should decide the case on an inspection of the documents filed and of the locality, and they further agreed to accept his decision. The Munsif gave his decision and thereupon an application for review of judgement was filed before him by the defendant on the grounds, *inter alia*, that the decision was vague and indefinite and also incomplete as all the matters in dispute were not decided. On the question whether the Munsif could not entertain the application for review, because he was an arbitrator,—

*Held* that the Munsif, in accepting the position of an arbitrator had a two-fold capacity. He was an arbitrator but he was also the court. If the arbitrator left anything undecided, the parties would be entitled to go to the court and to ask the court to remit the award to the arbitrator. The fact that the two capacities were constituted in the same person should not deprive a party of his right of having matters set right. *Baikanta Nath v. Sita Nath*, I. L. R., 38 Cal., 421, not approved.

The practice of a judicial officer accepting the position of an arbitrator without the previous sanction of his superior officer, and while the case remained pending in his court, was deprecated.

*Baijnath v. Dhani Ram*, I. L. R., 51 All. ... 903

**ASSESSMENT OF VALUE OF LAND OCCUPIED BY OCCUPANCY TENANTS, See**  
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**AWARD PURPORTING TO PARTITION PROPERTY—Signed by parties—Registration—Admissibility in evidence—Relinquishment of right of redemption by Hindu father—Without legal necessity and benefit to the family—Not binding on his sons.]** An award does not require registration merely because it is signed by the parties to the reference and purports to partition the property.

Where a Hindu father relinquished his right of redemption without any legal necessity or benefit to the family, the relinquishment was not binding on the sons..

*Tek Lal Singh v. Sripati Chowdhury*, 20 Indian Cases, 860, referred to, *Wazir Ali v. Mahbub Ali*, 22 Indian Cases, 412, followed.

*Mangali Frasad v. Babu Ram*, I. L. R., 51 All. ... 659

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CAUSE OF ACTION—Hundi—*Inadmissible in evidence for non-cancellation of stamp—Original consideration—Money had and received—Evidence aliunde—Act No. I of 1872 (Evidence Act), section 91—Notice of dishonour, when unnecessary—Act No. XXVI of 1881 (Negotiable Instruments Act), section 98(e)—Act No. IX of 1872 (Contract Act), section 70.* If a hundi is the embodiment of the whole contract between the parties, and the hundi is not admissible in evidence and cannot be looked at for the purpose of finding out the terms of the contract, then, under section 91 of the Indian Evidence Act, the plaintiff suing on the hundi cannot be allowed to adduce other evidence to prove the terms of such contract. But from the mere fact that a bill of exchange or hundi has been executed it does not necessarily follow that the whole of the contract between the parties has been reduced to the form of such a document. In many cases a promissory note or hundi may merely be a written security taken for the loan.

Where in a suit on a hundi, which was inadmissible in evidence, being written on stamps which were not properly cancelled, it appeared that besides the hundi the defendants executed a receipt which referred to it and contained an acknowledgment of receipt of the amount, and also wrote a letter to a certain firm showing that the arrangement between the parties was that the plaintiffs were to discharge the defendants' liability to the firm and the defendants promised to pay this amount to the plaintiffs and in token thereof the hundi was executed: Held that this was not a case in which the whole of the contract was embodied in the hundi, and the receipt and the letter were admissible for the purpose of showing the whole arrangement between the parties, the passing of consideration and the promise to repay. Even if the plaintiffs were not able to prove the whole contract by this additional evidence, they could succeed if their suit were treated as one for the recovery of money had and received, or for compensation for the amount paid by them on behalf of the defendants to the creditor of the latter, under section 70 of the Contract Act.

According to section 98(e) of the Negotiable Instruments Act, where the acceptor of a bill exchange is one of the drawers thereof, all the drawers are liable thereon even without any notice of dishonour being given. *Sheikh Akbar v. Sheikh Khan*, I. L. R., 7 Cal., 256, *Banarsi Prasad v. Fazal Ahmad*, I. L. R., 28 All., 298, *Sri Nath Das v. Angad Singh*, 7 A. L. J., 459, *Ram Sarup v. Jasodha Kumwar*, I. L. R., 34 All., 158, *Baij Nath Das v. Salig Ram* 16 Indian Cases, 33, *Muthu Sastrigal v. Visvanatha*, I. L. R., 38 Mad., 660, *Gurdas Mal v. Ishar Das*, 60 Indian Cases, 107, and *Pramatha Nath Sandal v. Dwarka Nath Dey*, I. L. R., 23 Cal., 851, referred to.

*Kundan Lal v. Bhikari Das, Ishwar Das*, I. L. R., 51 All. ... 530

CERTIFICATION OF PAYMENT—Statement in application for execution, *See Civil Procedure Code, order XXI, rule 2(1)* ... 237

CIVIL PROCEDURE CODE, SECTION 10—*Stay of suit—"Matter in issue"—Recurring liability—Suits for rent for successive years.* Section 10 of the Civil Procedure Code is not applicable to suits for recovery of rent for successive years; the pendency of an earlier suit for arrears of rent between the parties does not, therefore, bar the court from proceeding with a later suit for rent of subsequent years.



The mere fact that one issue is common in the two suits would not necessitate the stay of the subsequent suit. Although the words "matter in issue" cannot be held necessarily to mean the subject-matter in dispute, they must clearly mean the entire matter in controversy and not one of several issues in the case.

- Gargi Din v. Debi Charan, I. L. R., 51 All. ... 1017
- CIVIL PROCEDURE CODE, SECTION 11—Constructive res judicata—Failure by defendants in suit for specific performance of contract of sale to claim right of pre-emption ... 842
- CIVIL PROCEDURE CODE, SECTION 11—*Partition suit—Res judicata as between co-defendants—Conflict of interest inter se unnecessary.*] In a partition suit, if, for the purpose of giving relief to the plaintiff, a question has to be decided as between the different parties whether they are arrayed as plaintiffs or defendants, the decision is binding on all the parties, so as to be *res judicata* as between any co-defendants although there was no conflict of interest in the suit as between those defendants. *Parsotam Rao Tantia v. Radha Bai*, I. L. R., 32 All., 469, followed. *Nalini Kanta Lahiri v. Saranmoyi Debya*, 19 C. W. N., 531, referred to. *Muhammad Ahmad v. Zahur Ahmad*, I. L. R., 44 All., 334 and *Gangaram Balkrishna v. Vasudev Dattatraya*, I. L. R., 47 Bom., 534, distinguished.
- Ejaz Ahmad v. Saghir Bano, I. L. R., 51 All. ... 850
- CIVIL PROCEDURE CODE, SECTION 47—*Legal representative of deceased judgement-debtor—Claim by legal representative that property is his own and not an asset of the deceased judgement-debtor—Separate suit not maintainable.*] Where the legal representative of a deceased judgement-debtor asserts that the property attached and sought to be sold is his own property, acquired by him under a transfer previous to the attachment, and is not part of the assets of the deceased judgement-debtor, the question is one which comes within section 47 of the Civil Procedure Code. Hence, where no such claim was raised in the execution court and the property was sold and was purchased by the decree-holder, a suit to recover the property, based on such a claim, does not lie. *Seth Chand Mal v. Durga Dei*, I. L. R., 12 All., 313 and *Dulla v. Shib Lal*, I. L. R., 39 All., 47, followed. *Gulzari Lal v. Madho Ram*, I. L. R., 26 All., 447, *Bhagwati v. Banwari Lal*, I. L. R., 31 All., 82, and *Bulagi Das v. Kesri*, I. L. R., 50 All., 686, distinguished.
- Imtiaz Bibi v. Kabia Bibi, I. L. R., 51 All. ... 878
- CIVIL PROCEDURE CODE, SECTION 47—*Question between judgment-debtors inter se—Dispute as to the order in which several properties are to be sold—Question relating to execution, discharge or satisfaction of decree.*] *Per SEN, J., (NIAMAT-ULLAH, J., dubitante):*—A dispute between two judgment-debtors *inter se* as to the order in which the properties belonging to each, respectively, are to be sold in execution of a decree for sale on a mortgage is not a question arising "between the parties" within the meaning of section 47 of the Civil Procedure Code.
- Per NIAMAT-ULLAH, J.:*—The question whether an order deciding such a dispute by imposing certain conditions, on the fulfilment of which the properties would be sold in a certain order, is justifiable is not a question relating to "the execution, discharge or satisfaction of the decree" within the meaning of section 47 of the Civil Procedure Code.
- The view that section 47 can, under no circumstances, apply to a question as between two judgment-debtors *inter se* is not free from doubt. The words "between the parties" do not

imply that such parties must have been arrayed as plaintiff and defendant. If the scope of the section is narrowed down only to cases in which questions relating to execution, discharge or satisfaction of the decree arise between the decree-holder and the judgement-debtor, the very object underlying that section may be frustrated.

*Raynor v. The Mussoorie Bank, Ltd.*, I. L. R., 7 All., 681, *Anandi Kunwari v. Ajudhia Nath*, I. L. R., 30 All., 379, *Bhagwati v. Banwari Lal*, I. L. R., 31 All., 82, and *Vedaviasa Aiyar v. The Madura Hindu Labha Co., Ltd.*, [1924] A. I. R., (Mad.), 365, referred to.

*Abdul Aziz v. Abdul Rahim*, I. L. R., 51 All. ... 752

CIVIL PROCEDURE CODE SECTIONS 47, 145; ORDER XXI, RULES 90, 92(3)—*Surety for performance of order of Court*—“Party to suit”—*Objections by surety to attachment and sale of his property*—*Confirmation of sale*—*Suit by surety directed against the sale, not maintainable*—*Res judicata in respect of execution proceedings.*] A surety for the performance of an order passed in execution proceedings executed a security bond hypothecating certain property and also personally binding himself in case the property proved insufficient. Enforcement of the surety's liability was at first attempted as against the hypothecated property, but for certain reasons it was given up and the court ordered enforcement against the person and other property of the surety. Accordingly a house belonging to him was attached and sold. After the sale he made an application purporting to be under order XXI, rule 90, of the Code of Civil Procedure, and another under section 47, both being on the ground that the house could not be sold unless and until the hypothecated property was sold first. Then he filed a suit for a declaration to the same effect and withdrew his applications, which were accordingly dismissed and the sale confirmed. On the question whether the suit was maintainable, held :—

(1) Section 47 of the Code of Civil Procedure does not bar the suit because that section does not in terms apply to a surety, inasmuch as he is not a party to the suit. The effect of section 145 is that for purposes of appeal only he is deemed to be a party to the suit, and not that section 47 as a whole is applicable to him.

(2) When an order for execution is made against a surety under section 145, his position becomes that of a judgement-debtor. The proceedings taken against him are in the nature of execution proceedings and it is implied that he may make any objections which a judgement-debtor might make, though the mode in which they are to be made has not been expressly provided. If he raises objections to the sale and the objections are dismissed and the sale confirmed, he is bound by the orders passed against him and is not entitled to re-agitate the same questions by means of a separate suit. Such a suit is barred by the principle of *res judicata* and also by order XXI, rule 92(3).

(3) A suit for setting aside a sale may lie, even after confirmation of the sale, if the decree itself be attacked on the ground of want of jurisdiction or fraud. But where the ground of attack amounts only to an irregularity of procedure in execution, and not to want of jurisdiction, such a suit does not lie.

*Ram Kishun v. Lalta Singh*, I. L. R., 51 All. ... 346

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CIVIL PROCEDURE CODE, SECTION 60(k)—Provident Funds ...	845
CIVIL PROCEDURE CODE, SECTION 66— <i>Sale in execution—Benami purchase—Real purchaser obtaining title by adverse possession—Dispossession by transferee from benamidar—Indian Limitation Act (IX of 1908), section 28; article 144.</i> If after an auction sale of immovable property in execution of a decree the real purchaser has for twelve years possession adverse to the certified purchaser (his <i>benamidar</i> ) and is then dispossessed by a transferee of the certified purchaser, he can sue for possession on the title acquired by him under the Indian Limitation Act, 1908, section 28 and article 144, and need not aver or prove that the auction purchase was made for him; section 66 of the Code of Civil Procedure, 1908, therefore, does not apply in that case.	
Abdul Jalil Khan v. Obaid-ullah Khan, I. L. R., 51 All.	675
CIVIL PROCEDURE CODE, SECTION 92— <i>Waqf, See Muhammadan law</i> ...	30
CIVIL PROCEDURE CODE, SECTIONS 105(2) AND 151—Question of law wrongly decided in order of remand—Not appealed—Inherent power to remedy injustice ...	780
CIVIL PROCEDURE CODE, SECTION 115—"Case decided", <i>See Act No. XIV of 1920 (Charitable and Religious Trusts Act), section 7</i>	957
CIVIL PROCEDURE CODE, SECTION 115—Not applicable to matters under the Agra Tenancy Act ...	1020
CIVIL PROCEDURE CODE, SECTION 115—Deposit of mortgage money in favour of two persons—Court's failure to decide claim by one that he was sole mortgagee by survivorship—Revision ...	1016
CIVIL PROCEDURE CODE, SECTION 115— <i>Revision of first court decision, although confirmed in appeal and although no ground for revision of appellate court decision.</i> If a trial court has acted illegally or with material irregularity in the exercise of its jurisdiction, the High Court has power to interfere in revision, provided that no appeal lies to the High Court. Section 115 does not require that no appeal in the meantime should have been preferred to the court of the District Judge, or that, if an appeal is preferred, it is only the order of the District Judge which can be revised. And, when the record has been sent for, there is no force in the technical objection that the revision is described as one from the appellate order.	
Mahadeo Frasad v. Khubi Ram, I. L. R., 51 All.	1023
CIVIL PROCEDURE CODE, SECTION 115— <i>Revision—Practice—Where other remedy available—Criminal Procedure Code, section 476—Costs.</i> There is no invariable rule of the High Court under which an application for revision under section 115 of the Code of Civil Procedure should be refused where any other remedy is open, excepting, of course, in cases where an appeal lies to the High Court.	
A civil court taking proceedings under section 476 of the Code of Criminal Procedure would have jurisdiction to award costs to one or the other party in a case where the parties to such proceedings are the same as those in the civil litigation. It has no jurisdiction to award costs of such proceedings against a District Magistrate on whose application, drawing the attention of the court to the production of a seemingly forged document in a suit in that court, the proceedings were started, but who was not a party to the suit itself. <i>Ganga Charan v. Baddel</i> , 19 Indian Cases, 736 and <i>Debi Das v. Ejaz Husain</i> , I. L. R., 28 All., 72, referred to.	
Emperor (through District Magistrate of Etawah) v. Bihari Lal, I. L. R., 51 All.	938

- CIVIL PROCEDURE CODE, SECTION 115—Supersession of reference before award—"Case decided". See Arbitration ... 1010
- CIVIL PROCEDURE CODE, SECTIONS 115 AND 151—Interference not barred by possibility of another relief subsequently ... 1010
- CIVIL PROCEDURE CODE, SECTION 115; ORDER IX, RULE 9—Revision—"Case decided"—Dismissal for default—Restoration—Jurisdiction to revise.] The setting aside of an order dismissing a suit for default of appearance constitutes a "case decided" within the meaning of section 115 of the Civil Procedure Code, and the High Court has jurisdiction to revise the order of restoration. *Ram Sarup v. Gaya Prasad*, I. L. R., 48 All., 175, applied. *Buddhu Lal v. Mewa Ram*, I. L. R., 43 All., 564, referred to. *Faqir Chand v. Harkishun Das*, I. L. R., 51 All. ... 908
- CIVIL PROCEDURE CODE, SECTION 115; ORDER XXI, RULES 89 AND 92 (2)—Application for setting aside execution sale—Failure to implead all purchasers—Applicant not bound to ascertain and implead them—Duty on court to give notice to all persons affected—Revision—Scope of section 115, clause (c)—Adopting rule of procedure not warranted by law.] In execution of a simple money decree the property of the judgement-debtor was sold in three lots and was purchased by several persons, some of whom purchased on their own behalf and some on behalf of others. The judgement-debtor applied under order XXI, rule 89, of the Code of Civil Procedure to have the sale set aside. In this application he mentioned the names of the purchasers according to his knowledge, but failed to implead all the real purchasers. He repaired this omission later on, but beyond 30 days after the sale. His application was rejected on this ground. He appealed and being unsuccessful applied in revision.
- Held that order XXI, rule 89, of the Civil Procedure Code does not require the applicant to nominate any person as the opposite party, and it is not essential that there should be an application in writing in which the auction purchasers must be shown as opposite parties, as defendants are described in a plaint. Order XXI, rule 92 (2) indicates that the duty of giving notice to all persons affected should rest on the court or its officials, and there is nothing to indicate that the applicant for setting aside the sale should trace out who are the parties affected by his application and make them parties to it.
- Held, also that where a court had acted, as in the present case, by inventing a rule of procedure for itself, which was not warranted by the law, the case was not one of a mere wrong decision on a point of law, and the High Court was not only competent to interfere in revision but should interfere.
- If the result of a decision by the lower court is an illegal action, or action which may be described as material irregularity, the High Court has jurisdiction to interfere under section 115, clause (c), although the result may have been arrived at by following a ruling of the High Court.
- Yad Ram v. Sundar Singh*, I. L. R., 45 All., 425, distinguished. *Ishar Das v. Asaf Ali Khan*, I. L. R., 31 All., 186, *Balakrishna Udayar v. Vasudeva Ayyar*, I. L. R., 40 Mad., 793, *Dhanwanti Kuer v. Sheo Shankar*, 4 Pat., L. J., 340, *Birj Mohun Thakur v. Rai Uma Nath Chowdhry*, I. L. R., 20 Cal., 8, *Umed Mal v. Chand Mal*, I. L. R., 54 Cal., 338, referred to. *Karamat Khan v. Mir Ali Ahmed*, Weekly Notes, 1891, p. 121, and *Ali Gauhar Khan v. Bansidhar*, I. L. R., 15 All., 407, disapproved. *Sarvi Begum v. Haider Shah*, 9 A. L. J., 12, and *Ramraj Singh v. Rabi Prasad* 63 Indian Cases, 140, referred to. *Dip Chand v. Sheo Prasad*, I. L. R., 51 All. ... 910

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- CIVIL PROCEDURE CODE, SECTION 151—*Application for setting aside auction sale—Dismissal for default—Restoration.*] Under section 151 of the Civil Procedure Code a court has jurisdiction to restore an application for setting aside an auction sale, which was dismissed for default of appearance.
- Yudhistir Lal v. Fateh Singh, I. L. R., 51 All. ... 901
- CIVIL PROCEDURE CODE, SECTION 151—Inherent power to supersede reference to arbitration, *See Arbitration* ... 1010
- CIVIL PROCEDURE CODE, SECTION 152—*Amendment of judgement and decree on ground of accidental slip in judgement of predecessor in office.*] Under the provisions of section 152 of the Civil Procedure Code it is open to a court to correct the errors arising in the judgement and the decree from an accidental slip in the judgement; and this can be done by a successor in office of the judge who passed the judgement and decree in question. *Surtia v. Ganga*, I. L. R., 7 All., 411; 875, *Shahab Din v. Siraj-ud-din*, 17 Indian Cases, 418, and *Lakshman Iyengar v. Narayana Iyengar*, [1924] A. I. R., (Mad.), 225, distinguished.
- Hukum Singh v. Surajpal Singh, I. L. R., 51 All., ... 672
- CIVIL PROCEDURE CODE, ORDER I, RULE 1—*Joinder of plaintiffs—Three co-sharers joining in one suit for profits against a lambardar—Act (Local) No. 11 of 1901 (Agra Tenancy Act), sections 163 and 164.*] Several co-sharers may, by virtue of order I, rule 1, of the Civil Procedure Code, join as plaintiffs in one suit for profits against a lambardar under section 164 of the Agra Tenancy Act, 1901, inasmuch as the right to relief arises out of the same act, namely the non-distribution of profits by the lambardar on the due date.
- Fiare Lal v. Jhabba Lal, I. L. R., 51 All. ... 994
- CIVIL PROCEDURE CODE, ORDER II, RULE 2 AND ORDER XXXIV, RULE 14—*Mortgage—First suit for interest only—Second suit for principal—Whether suit maintainable.*] In a simple mortgage the condition was that the mortgagor would pay the principal with interest in five years, that the interest was to be paid every six months and that the creditor was entitled to recover the interest by a separate suit. After the principal money had become payable the mortgagee sued for the interest alone, claiming only a personal relief, and the suit was decreed. While the suit was pending the mortgagee filed another suit for recovery of the principal by sale of the mortgaged property. Held that the second suit was not barred by order II, rule 2 of the Code of Civil Procedure, by reason of the provisions of order XXXIV, rule 14. *Muhammad Hafiz v. Muhammad Zakariya*, I. L. R., 44 All., 121, and *Kishen Narain v. Pala Mal*, I. L. R., 4 Lah., 32, distinguished. *Indarpal Singh v. Mewa Lal*, I. L. R., 36 All., 264, referred to.
- Lalta Prasad v. Puran Lal, I. L. R., 51 All. ... 974
- CIVIL PROCEDURE CODE, ORDER IX, RULE 13, AND ORDER XXXIV, RULE 3—*Final decree for foreclosure passed ex parte—Setting aside ex parte decree—Jurisdiction.*] Although order XXXIV, rule 3, of the Civil Procedure Code does not require notice to be given to the defendant before the passing of a final decree for foreclosure, yet if on account of the want of such notice the defendant is absent and the final decree is passed in his absence, such decree is an *ex parte* decree and the provisions of order IX, rule 13, are applicable to it. The court has jurisdiction to set it aside if there was sufficient cause for the non-appearance of the defendant; and want of knowledge of the plaintiff's application for a final decree is a sufficient cause.

*Mahadeo Pande v. Somnath Pande*, I. L. R., 48 All., 828,  
*Ramji Lal v. Karan Singh*, I. L. R., 39 All., 532, *Sital Singh v.*  
*Bajnath Prasad*, I. L. R., 44 All., 668 and *Bibi Tasliman v.*  
*Harihar Mahto*, I. L. R., 32 Cal., 253, referred to.

*Awadh Bihari v. Fahiman*, I. L. R., 51 All., ... 634

CIVIL PROCEDURE CODE, ORDER XX, RULE 14 AND ORDER XXI, RULE 15—  
*Pre-emption—Joint decree in favour of two co-plaintiffs—Execution of whole decree by one decree-holder—Whole money deposited by one without contribution by the other—Possession of whole property delivered to him—Suit by the other for half share.* A and R jointly filed a suit for pre-emption and a joint decree was passed in their favour. R deposited the whole of the pre-emption money, though apparently without any specific allegation that he was doing so solely on his own account, and applied for execution in his own favour and possession was delivered to him of the entire property. A then filed a suit against R for a half share. It was found that A had not contributed anything towards payment of the pre-emption money. No agreement or understanding between A and R was pleaded or proved that R was to make the payment on behalf of both and that the accounts would be adjusted afterwards. It was further found that A was merely a dummy in the pre-emption suit and that R had made him a co-plaintiff merely to prevent him bringing a separate and possibly collusive suit for pre-emption against the vendees. On these facts, *Held*—

*Per SULAIMAN, J.*—The mere passing of a decree for pre-emption does not confer on the plaintiffs any title to the property; it is the payment of the pre-emption money which gives them such title. A co-plaintiff who refuses to pay the pre-emption money within the time specified in the decree cannot be allowed to claim a share in the property if afterwards he is in a position to contribute.

In order to determine in what proportion the joint plaintiffs are to share the property, the circumstances under which the payment was made must in each case be inquired into. If any one of the co-plaintiffs has really refused to contribute towards the payment of the purchase money and in that way impliedly withdrawn his claim, and the payment of the whole amount is made by the other co-plaintiff, there being no arrangement or understanding about any contribution to be made later on, the whole property ought to go to the latter.

The deposit of the pre-emption money within the time fixed by the decree is not a proceeding in execution of the decree and, therefore, order XXI, rule 15 of the Civil Procedure Code does not apply to it.

*Per BOYS, J.*—It is impossible to hold that the trial court in a pre-emption suit must, when the money is deposited by one of two or more co-plaintiffs, inquire into the question whether the money is deposited on behalf of all the plaintiffs or only on behalf of one.

*Prima facie* the deposit must be taken to be made on behalf and for the benefit of all the decree-holders, unless the application accompanying the tender contains any specific allegation that the plaintiff making the deposit is doing so solely on his own account and claims to reap the whole benefit of the decree.

The principle of order XXI, rule 15 was applicable to the deposit of money in accordance with a pre-emption decree; and the deposit, whether made by the one co-plaintiff out of his own pocket or not, would enure to the benefit of the other co-plaintiff

also. The application for delivery of possession was of course an application in execution and order XXI, rule 15 applied to it.

In face of the finding, however, that the present plaintiff was merely a dummy in the pre-emption proceedings, he could not now plead that the deposit made and the possession obtained by the present defendant enured to his benefit.

Anrup Misir v. Ram Harakh, I. L. R., 51 All. ... 993

CIVIL PROCEDURE CODE, ORDER XX, RULE 14(2), ORDER XXII, RULES 4(3) AND 11, *See* Pre-emption ... 267

CIVIL PROCEDURE CODE, ORDER XXI, RULE 2(1)—*Execution of decree—Decree-holder certifying payment out of court—Limitation—Statement of payment in application for execution—Decree payable by instalments—Provision that on default of any two successive instalments the whole of the balance shall be paid—Act No. IX of 1908 (Indian Limitation Act), articles 181 and 182(7).]* There is no period of limitation applicable to a decree-holder certifying a payment under order XXI, rule 2(1), of the Civil Procedure Code.

It is not necessary that a decree-holder must certify the payment some time before the decree would, if such payments were ignored, be time-barred.

A statement of payment made by the decree-holder in the application for execution satisfies the requirements of order XXI, rule 2(1) and permits him to prove that the payment was in fact made.

If, after an application for execution has been made, the decree-holder makes a statement purporting to certify an alleged payment, then if such statement is made before any controversy arises, either by a court officer reporting the application to be barred by limitation or by objection by the judgement-debtor or otherwise, such statement has the effect of a certificate. But if such statement is made after controversy arose, while there is no reason why the court should refuse to allow the statement to be filed for any other purpose than that of constituting a certificate, e.g., to place on record evidence suggesting that the omission in the application for execution was a *bond fide* mistake, it cannot have the force of a certificate.

Where a decree directs payment by instalments on named dates, and further directs the judgement-debtor to pay the entire balance due if he makes default as to any two successive instalments, then—

(1) If the application for execution is one for the payment of instalments under the first part of the decree, it will be governed by article 182(7) of the Limitation Act, and the date from which limitation will run as regards each instalment will be the date on which that instalment was due.

(2) [*Per* SULAIMAN, A.C.J., and BOYS, J., (MUKERJI, J.,) dissenting]. If the application for execution is one for the remaining unpaid balance of the decretal amount under the second part of the decree, it is not governed by article 182 at all but by article 181 and limitation will run from the date of the last of any two successive defaults, the decree-holder being entitled to recover the whole balance due less the amount of any individual instalments which, regarded as individual instalments, are already barred by limitation.

In cases of this description it is undesirable to interpret the application too strictly; the court may well pay regard to the substance of the application.



*Peare Mohan v. Raghunath*, I.L.R., 50 All., 259, *Shankar Prasad v. Jalpa Prasad*, I.L.R., 16 All., 371, *Lachmi Narain v. Sarju Prasad*, I.L.R., 39 All., 230, *Maung Sin v. Ma Tok*, L.R., 54 I.A., 272, and *Muhammad Islam v. Muhammad Ahsan*, I.L.R., 16 All., 237, referred to. *Bahy Muhammad Saha v. Aijanmai*, 26 C.W.N., 529, dissented from. *Baij Nath v. Panna Lal*, I.L.R., 46 All., 635, *Gokul Chand v. Bhika*, 12 A.L.J., 387, and *Bhajan Lal v. Cheda Lal*, 12 A.L.J., 825, overruled. *Chhat-tar Singh v. Amir Singh*, I.L.R., 38 All., 204, not approved.

*Joti Prasad v. Sri Chand*, I.L.R., 51 All. ... 237

**CIVIL PROCEDURE CODE, ORDER XXXIV, RULE 5—Final decree for sale passed pending an appeal from a preliminary decree—Validity.]** A final decree for sale on foot of a mortgage, passed during the pendency of an appeal from the preliminary decree which is eventually affirmed by the court of appeal, is valid and binding on the parties and is capable of execution; but since it can not include costs of the appellate court the mortgagee seeking to execute it cannot insist on including such costs, as he could do if he obtained a final decree on foot of the preliminary decree passed on appeal. *Lalman v. Shiam Singh*, 24 A. L. J., 288, distinguished. *Gajadhar Singh v. Kishan Jiwan Lal*, I. L. R., 39 All., 641; *Fitzholmes v. Bank of Upper India, Ltd.*, I. L. R., 8 Lah., 253; and *Jowad Husain v. Gendan Singh*, 24 A. L. J., 765, referred to.

*Khair-un-nissa Bibi v. Oudh Commercial Bank, Ltd.*, I. L. R., 51 All. ... 640

**CIVIL PROCEDURE CODE, ORDER XLI, RULE 19—Appeal dismissed for default—Pleader engaged in another court—"Sufficient cause" for restoration.]** When an appeal was called on, the appellant's were present in court but their pleader was arguing a case in another court near by, and one of the appellants went to call him. The pleader came up after 10 or 12 minutes, but the appeal had in the meantime been struck off in default. An application for restoration was disallowed. On appeal the case was restored and it was held that in these circumstances it would have been the proper course for the court to have stood the case over for a few minutes to enable the pleader to attend. Whilst courts of law have a right to insist that parties and their pleaders shall be ready when the case is called on, allowance must at times be made for an inevitable happening such as this case and some indulgence shown in order that the parties may have their case decided on the merits.

*Nathu v. Babu Ram*, I. L. R., 51 All. ... 756

**CIVIL PROCEDURE CODE, ORDER XLI, RULE 33—Appeal—Jurisdiction—Competence of appellate court to give a decree in favour of a person not a party to the appeal before it.]** On the death of the plaintiff to a suit as next reversioner to set aside a mortgage made by a Hindu widow an application for substitution was made by one M, alleged to be the widow, and ML, alleged to be the son of the deceased plaintiff. These persons were brought upon the record, and a decree was passed in favour of ML upon the following findings:—(1) that the original plaintiff was a collateral heir of the last male owner of the property claimed; (2) that M was his lawful wife; (3) that ML was M's son by a former husband and not the son of the last male owner, but by a caste custom he was to be counted as the natural son of the last male owner; (4) that the mortgage in favour of the defendant was without legal necessity.

On appeal by the mortgagee, the finding of the trial court as to the caste custom set up by ML was not sustained.



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*M* had not appealed; but it was argued that she ought to be given a decree under order XLI, rule 33, of the Code of Civil Procedure.

*Held*, the powers given to a court by order XLI, rule 33, were of a very special nature and should be exercised sparingly; and the present case was not one which called for their use.

The scope of order XLI, rule 33, explained.

*Purnell v. Great Western Railway Company*, [1876] 1 Q.B.D., 636, *Sandford v. Porter*, [1912] 2 Ir. R., 551, *Attorney-General v. Simpson*, [1901] 2 Ch., 671, *Rangam Lal v. Jhandu*, I. L. R., 34 All., 32, *Simpson v. Attorney-General*, [1904] A.C., 476, *Huntly v. Gaskell*, [1905] 2 Ch., 656, *Rutherford v. Rutherford*, [1922] P., 144, *Rutherford v. Richardson*, [1923] A. C., 1, *Mahomed Khaleel Shirazi v. Les Tanneries Lyonnaises*, I.L.R., 49 Mad., 435 and *Chockalingam Chetty v. Seethai Ache*, 26 A. L. J., 371, referred to.

*Rukia v. Mewa Lal*, I. L. R., 51 All. ... 63

CIVIL PROCEDURE CODE, ORDER XLI, RULE 33—*Whether appellate court can pass decree against a person not party to the appeal—Hindu law—Alienation by manager—Right of transferee from coparceners to question the alienation.*] Order XLI, rule 33, of the Code of Civil Procedure does not authorize the passing of a decree against a person who is not a party to the appeal, though it allows a decree in favour of a plaintiff who has not appealed.

A transferee of any property or interest in property from a coparcenary body acquires along with that property or interest the right of the coparcenary body to call in question a previous alienation made by the manager of the family, otherwise than for legal necessity, for the purpose of protecting or defining the property or interest acquired. Hence, when a manager executed a mortgage without legal necessity, and subsequently the coparceners executed a second mortgage in which no mention was made of the first, and the second mortgagees obtained a decree for sale on their mortgage and at execution sale purchased the property subject to the first mortgage, it was held that the second mortgagees were entitled to impugn the validity of the first mortgage, it being necessary to do so in order to define their interest; they could also claim to avoid, as being by their purchase the successors in interest to the coparceners of the right to avoid. *Rukia v. Mewa Lal*, I. L. R., 51 All., 63, doubted. *Nannu Prasad v. Nazim Husain*, I. L. R., 50 All., 517, *Muhammad Muzamil-ullah Khan v. Mithu Lal*, I. L. R., 33 All., 783, *Jagesar Pande v. Deo Dat Pande*, I. L. R., 45 All., 654, *Sarju Prasad Rao v. Mangal Singh*, I. L. R., 47 All., 490, *Raj Ballao v. Dalip Narain Singh*, [1926] A. I. R., (All.), 718, *Subba Gounden v. Krishnamachari*, I. L. R., 45 Mad., 449, *Nasir-uddin v. Ahmad Husain*, 25 A. L. J., 20, referred to. *Durga Prasad v. Bhajan I. L. R.*, 42 All., 50, distinguished.

*Madan Lal v. Gajendrapal Singh*, I. L. R., 51 All. ... 575

CIVIL PROCEDURE CODE, SCHEDULE II, PARAGRAPH 5—*Arbitration—Appointment of fresh arbitrator when original arbitrator refuses to act—Procedure—Court appointing arbitrator on remuneration, without parties' consent—Civil Procedure Code, section 115—"Case decided"*—Order appointing fresh arbitrator.] The parties to a suit agreed to refer the dispute to the arbitration of a named arbitrator. An order of reference was made accordingly, but the arbitrator declined to act. The defendant then applied to the

court that anyone out of nine persons nominated by him might be appointed as arbitrator. The plaintiff was no longer willing to have the case decided by an arbitrator and prayed that the arbitration be superseded. Thereupon the court appointed a certain person as arbitrator, on payment of Rs. 100 by the parties in equal shares, although in the original agreement of reference there was no provision for any remuneration. The plaintiff expressed his unwillingness to make any payment, but the court insisted on its order.

*Held*, in revision, that the appointment of the arbitrator was not in compliance with the provisions of schedule II, paragraph 5, of the Code of Civil Procedure, and the court's order, summarily appointing the arbitrator and directing the parties to pay a remuneration, was without jurisdiction or at least tainted with material irregularity.

*Held*, also, that the order of the court, deciding the controversy between the parties as to whether the arbitration should be superseded or a fresh arbitrator should be appointed, was an order deciding a "case" within the meaning of section 115 of the Code of Civil Procedure and a revision lay.

Jagannath Sahu v. Chhedi Sahu, I. L. R., 51 All. ... 501

CIVIL PROCEDURE CODE, SCHEDULE II, PARAGRAPH 14, *See* Arbitration by court ... 908

COGNIZANCE OF OFFENCE OF BRINGING A FALSE CHARGE, *See* Criminal Procedure Code, sections 190(b), 195(1)(b) ... 382

COMPROMISE—*Family arrangement*—Is not an exchange, and may be oral—Petition signed by claimants in mutation proceedings—Want of registration, effect of—Act No. XVI of 1908 (Indian Registration Act), sections 17, 49—Act No. I of 1872 (Indian Evidence Act), section 91—"Part performance", doctrine of—How far applicable to India.] Where an application for mutation of names was contested and then all the parties, by a joint application, stated that they had arrived at a compromise and asked for mutation to be made in the names of the several parties in certain shares, and order was made and possession was taken by the parties accordingly, and shortly thereafter the original applicant sued to recover the whole property against the other parties, who set up the compromise as a bar: *Held*—

In the usual type of family arrangement, unless any item of property which is admitted by all the parties to belong to one of them is allotted to another, there is no "exchange" or other transfer of ownership. A binding family arrangement of this type can be made orally, and if made orally, no question of registration arises.

If such arrangement is followed by a writing containing reference to it, then the question is whether thereby the terms of the arrangement have been "reduced to the form of a document", i.e. formally recorded in a document with the purpose that they should be evidenced by that document, and that is a question of fact in each case to be determined upon a consideration of the nature and phraseology of the writing and the circumstances in which and the purpose with which it was written.

If such arrangement was in fact "reduced to the form of a document", registration (when the value is Rs. 100 or upwards) is necessary by section 17 of the Registration Act, and the absence of registration makes the document inadmissible in evidence, under section 49 of the Registration Act, in proof of the arrangement, and under section 91 of the Evidence Act no other proof thereof can be given.

If the terms were not "reduced to the form of a document" registration was not necessary, even though the value is Rs. 100 or upwards; and while the writing cannot be used as a document of title, it can be used as a piece of evidence for what it may be worth, e.g., as corroborative of other evidence or as an admission of the transaction or as showing or explaining conduct.

Where it has been found that there is no legally binding oral family arrangement, or that the arrangement, though reduced to writing with the intention that the document should be the document of title, cannot be proved for want of registration, and where no question of estoppel arises, the mere facts that mutation has taken place and that possession has been taken cannot remedy, by virtue of what is known to English law as the doctrine of "part performance", the absence of registration.

The positive rules of law, contained, for example, in the Transfer of Property Act, cannot be overridden by the doctrine of part performance, which is an equitable doctrine which arose in connection with the English Statute of Frauds.

*Trigge v. Lavallee*, 15 Moo. P. C., 270, *Rani Mewa Kuwar v. Rani Hulas Kuwar*, L. R., 1 I. A., 157, *Khunni Lal v. Gobind Krishna*, I. L. R., 33 All., 356, *Hiran Bibi v. Sohan Bibi*, 18 C. W. N., 929, *Chokhey Singh v. Jote Singh*, I. L. R., 31 All., 73, *Maddison v. Alderson*, L. R., 8 App. Cas., 467, *Salamat-uz-Zamin v. Mashallah Khan*, I. L. R., 40 All., 187, *Mulraj Khatau v. Vishwanath Prabhuram*, I. L. R., 37 Bom., 198, *Maung Shwe Goh v. Maung Inn*, I. L. R., 44 Cal., 542, and *Arseculeratne v. Perera*, [1928] A. C., 173, referred to. *Mahomed Musa v. Aghore Kumar Ganguli*, I. L. R., 42 Cal., 801, distinguished. *Kunti v. Gajraj Tiwari*, I. L. R., 46 All., 847, not approved.

*Ram Gopal v. Tulshi Ram*, I. L. R., 51 All. ... 79

CONSIDERATION—Renewal of minor's bond on attaining majority, *See* Acts—1872—IX (Indian Contract Act) sections 11 and 25 (2) ... 164

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CO-OBLIGEEs—*Heirs of a usufructuary mortgagee—Muhammadian law—Payment to and discharge by one of the heirs—Powers of a de facto guardian—A'kar.* Where, upon the death of a usufructuary mortgagee, his estate devolves upon a number of heirs under the Muhammadian law, each of such heirs has a distinct and defined interest in the mortgaged property, and payment to one of the heirs without the concurrence of the rest cannot operate as a valid discharge of the mortgage debt.

Under the Muhammadian law a *de facto* guardian of a minor, (e. g. an elder brother who has taken upon himself the management of the property inherited by himself and his minor brother from their father), has no authority to deal with the minor's interest in immovable property, which is technically described as *a'kar*, and cannot therefore give a valid discharge or release of the minor's interest in the property which had been held by the father as usufructuary mortgagee.

*Ram Autar v. Ghulam Dastgir*, I. L. R., 51 All. ... 589

"CO-SHARER", *See* Act (Local) No. XI of 1922 (Agra Pre-emption Act), sections 4(1) and 20 ... 629

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COURT FEES— <i>Deficiency in lower court demanded by appellate court from respondent—Non-compliance by respondent—Power to refuse him hearing—Power to refuse him costs.</i> ] Where the respondent (plaintiff), on being called upon by the appellate court to make good a deficiency in the court fee paid by him in the first court, does not comply, the appellate court can not only stay issuing its decree if it be in his favour, but can refuse to hear him on the appeal and can, if the appeal fails, refuse him costs. <i>Mohan Lal v. Nand Kishore</i> , I. L. R., 28 All., 270, referred to.	
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CRIMINAL PROCEDURE CODE, SECTION 106— <i>Security for keeping the peace—Conviction under section 323, Indian Penal Code—Offence involving a breach of the peace—Likelihood of recurrence—Graver offence proved than that charged—Duty of court—Summary trial.</i> ] It is not right for a court to minimise an offence and shut its eyes to a graver offence which on the facts found by it has been committed, and to refrain from charging the accused with that offence, and by such abstention to justify itself in trying the case summarily.	
In all ordinary cases of conviction under section 323 of the Indian Penal Code there is a conviction for an offence involving a breach of the peace, and the necessity and desirability of taking security under section 106 of the Code of Criminal Procedure must be judged in each case and must depend upon how far the circumstances indicate that such a breach of the peace is likely to recur. <i>Emperor v. Atma Ram</i> , I. L. R., 49 All., 131, and <i>Muhammad Rahim v. Emperor</i> , 23 A. L. J., 1053, explained. <i>Sobha Ram v. Emperor</i> , Cr. Ref., No. 18 of 1928, decided on 2nd of May, 1928, followed.	
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CRIMINAL PROCEDURE CODE, SECTIONS 109, 436— <i>Discharge under section 119—Further inquiry by District Magistrate—Jurisdiction—"Offence."</i> ] A District Magistrate has no jurisdiction under section 436 of the Criminal Procedure Code (as amended by Act XVIII of 1923) to take up in revision, and order further inquiry into, the case of a person against whom proceedings under section 109 were taken and who was discharged under section 119. Such a person is not a "person accused of any offence" within the meaning of section 436. <i>Velu Tavi Ammal v. Chidambaravelu Pillai</i> , I. L. R., 33 Mad., 85 and <i>Emperor v. Roshan Singh</i> , I. L. R., 46 All., 235, followed. <i>King-Emperor v. Fyaz-ud-din</i> , I. L. R., 24 All., 148, not followed.	
<i>Emperor v. Neur Ahir</i> , I. L. R., 51 All. ...	408
CRIMINAL PROCEDURE CODE, SECTION 110— <i>Notice—Evidence of general repute—Admissibility of suspicions—Admissibility of previous convictions and the evidential value thereof—Reference—Procedure.</i> ] In proceedings under section 110 of the Criminal Procedure Code each man proceeded against is entitled to a separate notice and not to have the charges which are going to be made against him confused with the charges that are being made against somebody else.	

The suspicion of a witness that the accused person committed a particular theft is wholly inadmissible. A witness can not say what he suspects. He can depose to facts within his knowledge, and it will be for the magistrate to determine whether those facts alone or with other evidence create such a conviction in his mind as to justify calling for security.

Evidence of general repute does not mean the placing of a heterogeneous mass of more or less general statements by any witness who can be produced to say something on hearsay or otherwise and label it "general repute". A man's general repute is just as much a fact as any other fact which can be proved by a witness, and the witness should be asked questions to show that he is in a position to know what the general reputation of the accused is, and as to when and in what circumstances he has heard the character of the accused discussed.

The existence of previous convictions of offences such as theft is a matter which may and should be taken into consideration as indicating the character and disposition of the accused. At the same time weight must be given to a consideration of the period that has elapsed subsequent to the last conviction, in order to see whether the accused has since shown a disposition to conduct himself properly.

Proper procedure for making a Reference to the High Court pointed out.

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CRIMINAL PROCEDURE CODE, SECTION 110(c)—*Harbouring "thieves"*—*"Thieves" does not include dacoits—Indian Penal Code, section 216A.*] The provisions of section 110(c) of the Code of Criminal Procedure relating to harbouring of thieves are not to be applied to harbouring of dacoits, which is intended to be dealt with under the substantive provisions of section 216A of the Indian Penal Code.

Emperor v. Manni Lal Awasthi, I. L. R., 51 All. ... 459

CRIMINAL PROCEDURE CODE, SECTIONS 110 AND 117(4)—*Security for good behaviour—Evidence—Admissibility—General repute—"Bad character"—Hearsay evidence—Evidence that accused was suspected of certain thefts—Evidence that accused was previously bound over to be of good behaviour.*] In a case under section 110 of the Code of Criminal Procedure a witness should not be allowed to state *merely* that an accused person is a "bad character", as that expression is too vague; but where he immediately follows this up by saying that the person habitually commits theft, there is no ambiguity about his meaning and his deposition is relevant and admissible as evidence of general repute.

Evidence of general repute must necessarily consist largely of "hearsay" evidence. The reputation of a person means what is generally said or believed about his character. A witness may depose "I believe the accused to be a habitual thief, and that is what persons of the neighbourhood generally say about him". Such evidence is admissible as evidence of general repute.

The evidence of a witness who says that *he himself suspected* the accused person of having committed a certain offence is admissible; evidence that the accused person has been so suspected by persons other than the witness, although it may be inadmissible for proving general repute, would nevertheless be admissible as showing one of the grounds for the witness's opinion.

The fact that a person has on a previous occasion been bound over under section 110 may be stated and proved as one of the grounds on which the witnesses to general repute believe the accused to be a habitual offender. *Emperor v. Kurwa* 26 A.L.J., 519, explained. *Raham Ali v. King-Emperor*, 11 A. L. J., 461, and *Raj Narain Pandey v. Emperor*, 25 A. L. J., 393, referred to.

*Emperor v. Kumera*, I. L. R., 51 All. ... 275.

CRIMINAL PROCEDURE CODE, SECTION 133—*Removing a trade or occupation—Borrow-pits dug for brick-making—Order to cease the brick-making, and also to fill up the existing pits—Legality of latter part of order.*] Where a Magistrate passed an order under section 133 of the Code of Criminal Procedure to stop a trade or occupation of brick-making which was going on in a particular locality, on the ground that it was injurious to the health or physical comfort of the community inasmuch as the borrow-pits made for the purpose of brick-making became breeding grounds for mosquitoes, and also to fill up the existing pits and restore the *status quo*: Held, that the power "to remove" any trade or occupation, conferred by section 133, did not cover such an order to restore the *status quo* by filling up the existing pits.

*Emperor v. Bhagat Ram*, I. L. R., 51 All. ... 489.

CRIMINAL PROCEDURE CODE, SECTIONS 133, 140—*Public nuisance—Finding of magistrate—Revision—Civil suit to question absolute order under section 140—Maintainability.*] A court of revision should not examine the evidence and interfere with a finding of fact of a magistrate that a certain construction was a public nuisance.

Although a conditional order made by a Magistrate under section 133 of the Criminal Procedure Code cannot, by reason of the second paragraph of that section, be questioned by a civil suit, there is no such bar to the absolute order, made under section 140, being questioned in a civil court.

*Emperor v. Duli Chand*, I. L. R., 51 All. ... 1025.

CRIMINAL PROCEDURE CODE, SECTION 139A—*Public right, denial of—Power of Magistrate to require either party to get the question of the right decided by a civil court—Jurisdiction.*] A Magistrate, while staying proceedings in accordance with clause (2) of section 139A of the Criminal Procedure Code, has jurisdiction to direct a party to take proceedings in the civil court for decision of the matter of the existence of the public right in question and to fix a period of time therefor.

*Risal Singh v. Baljit Singh*, I. L. R., 51 All. ... 890.

CRIMINAL PROCEDURE CODE, SECTIONS 190(b), 195(1)(b)—*Act No. XLV of 1860 (Indian Penal Code), section 211—Complaint to police—Subsequent similar complaint in court—Prosecution for false charge—Cognizance on written report of police officer—Written complaint of court not required.*] When a false charge is made to the police an offence under section 211 of the Indian Penal Code is complete; and it cannot be said, merely because a similar complaint was subsequently made in a court, that the offence was committed in, or in relation to, any proceeding in any court, within the meaning of section 195(1)(b) of the Code of Criminal Procedure. A complaint in writing of such court is not, therefore, necessary for prosecution for such offence.

A Magistrate has the power to take cognizance under section 190(b) of the Code of Criminal Procedure on a written report by a police officer, without that officer having taken action under section 195(1)(a).

*Emperor v. Prag Datt*, I. L. R., 51 All. ... 382.

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CRIMINAL PROCEDURE CODE, SECTIONS 190, 197, 202, 561A—*Cognizance—Jurisdiction of Magistrate to take cognizance—Search and seizure of property by District Magistrate on complaint of an offence requiring sanction under section 197—High Court's power of interference—Act (Local) No. II of 1916 (U. P. Municipalities Act), section 82(1)—Public servant.*] Where a District Magistrate, on receipt of a complaint that a member of a Municipal Board had by contravening section 82(1) of the U. P. Municipalities Act committed an offence under section 168 of the Indian Penal Code, and in the absence of sanction of the Local Government required by section 197 of the Code of Criminal Procedure, took cognizance and started an inquiry and under his orders a Subordinate Magistrate searched the house of the accused and seized his account books: *Held*, that the District Magistrate had no jurisdiction to take cognizance as he had done and that the High Court had inherent power to interfere, under section 561A of the Code of Criminal Procedure, and even independently of the Code.

Emperor v. Bhairon Prasad, I. L. R., 51 All. ... 377

CRIMINAL PROCEDURE CODE, SECTIONS 233, 234, 236, 239—*Joinder of charges against several accused—Abetment as alternative charge counts as a distinct charge—Joint trial of two accused for three offences of the same kind, each accused being also charged in the alternative with having abetted the other—Prejudice.*] Two servants of a Government treasury were charged with three offences of criminal breach of trust, committed within the space of twelve months; each accused was also charged, in the alternative, with abetment of breach of trust committed by the other, in respect of each of the three items. They were tried jointly in one trial on all the charges. *Held* that when a man was charged in the alternative with embezzlement or abetment thereof he had to meet two distinct sets of circumstances, and each of the accused therefore was really tried for six offences. This was against the spirit of the provisions of section 233 of the Code of Criminal Procedure and was not covered by any of the exceptions detailed in the sections following it. The trial was illegal; and the question whether the accused were prejudiced or not did not arise.

The provisions of section 236 could not be utilized to declare the charge in the alternative of embezzlement and abetment thereof to be one charge; it involved two separate charges.

Scope of section 239 discussed. *Ram Prasad v. King-Emperor*, 19 A. L. J., 796, and *Emperor v. Sheo Saran Lal*, I. L. R., 32 All., 219, referred to. *In re Bal Gangadhar Tilak*, I. L. R., 33 Bom., 221, distinguished.

Emperor v. Janeshar Das, I. L. R., 51 All. ... 544

CRIMINAL PROCEDURE CODE, SECTIONS 240, 403—*Conviction on one of two charges—Withdrawal of revision application by complainant in respect of the other charge—Operates as acquittal on that charge—Trial for act falling within two sections of the Penal Code—Conviction under one section—Second trial under the other section barred.*] *G* was tried for offences under sections 211 and 500 of the Indian Penal Code on the complaint of *M* that *G* had made a false report against *M* and *B* alleging that they had taken part in a dacoity. *G* was convicted under section 500 only. *M* applied in revision to the High Court for a sentence under section 211 also, but withdrew the application. Thereafter *B* filed a complaint against *G* under section 211. On the question whether *G* could be tried again,—



*Held*, that the withdrawal by *M* of his application in revision, with the consent of the High Court, amounted to a withdrawal of the charge under section 211; and according to section 240 of the Criminal Procedure Code, which was applicable to every grade of court and not only the trial court, the withdrawal had the effect of an acquittal on a charge under section 211 and *G* could not be tried again on it.

Also, by reason of the provisions of section 403 (2) of the Criminal Procedure Code, when a separate charge has been framed against a person under any of the sub-sections other than sub-section (1) of section 235, he cannot be tried for the separate charge when he has once been convicted or acquitted of one charge; and in the present case the two separate charges, namely under section 211 and under section 500 of the Indian Penal Code, were framed not under sub-section (1) but under sub-section (2) of section 235. *Sharbekhan v. The Emperor*, 10 C. W. N., 518, followed.

*Ghamandi Nath v. Babu Lal*, I. L. R., 51 All. ... 977

CRIMINAL PROCEDURE CODE, section 342—Conviction on statement of accused person, *See* Indian Penal Code, section 499, exception 9 813

CRIMINAL PROCEDURE CODE, SECTIONS 443, 446—*Complaint by Indian against an European and some Indians jointly in a warrant case—Magistrate holding chapter XXXIII applicable—Section 446 mandatory—Jurisdiction—Magistrate cannot try the Indians after discharging the European.* Where a Magistrate decided under section 443 of the Code of Criminal Procedure that a case ought to be tried under the provisions of chapter XXXIII, and the case, in which an European and some Indians were the co-accused, was a warrant case, and subsequently the Magistrate discharged the European accused, apparently on insufficient grounds, and proceeded to take up the case against the Indians: *Held*, the provisions of section 446 of the Code are mandatory and a Magistrate, after once deciding under section 443 that chapter XXXIII is to apply, cannot assume jurisdiction to try the case by discharging the European accused; he must, if he does not discharge the Indian accused persons under section 209 or section 253, commit them for trial to the court of Session.

*Emperor v. Banarsi Das*, I. L. R., 51 All. ... 483

CRIMINAL PROCEDURE CODE, SECTION 498—*Bail—Cross-cases—One party already on bail.* Where members of two parties were being prosecuted and one of them was released on bail, and the other party applied for bail for the purpose of instructing counsel, as otherwise the opposite party would have a better chance of presenting their case before the court:

*Held* that the reasons alleged must weigh with a court, and if there was no danger of the applicant absconding if released on bail, he should be released.

*Emperor v. Fateh Singh*, I. L. R., 51 All. ... 603

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DEFAMATION—Slander—Suit for damages—Imputation of dishonesty against tradesman—Special damage, whether necessary—Malice, whether necessary ingredient—Privilege—Defamatory remark in 'terjected' by counsel during examination of witness by another counsel—Costs, when allowable in full although claim only partially decreed.] A complaint of cheating was brought by *C* against *B*, a partner in a trading firm, in respect of a transac-



tion with the firm. During the trial *C* was asked in cross-examination by *B*'s vakil whether *B*'s firm was the biggest firm of grain dealers in the city, and *C* said yes. Thereupon *R*, the mukhtar who was appearing for *C* in the case, interjected the remark, audible to several persons in court, that *B*'s firm were also the most dishonest people in the city. The case terminated in a dismissal of the complaints. *B* then sued *R* for damages for slander.

Held that the distinction in English law between slander being actionable *per se* in certain cases and not being actionable in other cases without proof of special damage has not been recognized or followed with unanimity by the Indian High Courts. Even under the common law of England, slander or oral defamation is actionable in certain cases without proof of special damage, and one of such cases is where the plaintiff was affected by the words in his office, profession or trade. In such a case special damage, in the sense that actual and temporal loss has in fact occurred need not be proved.

The remark interjected by the mukhtar was entirely uncalled for and could not be regarded as being either in furtherance of the interests of his client in the case or in the discharge of his professional duty towards his client, and could not in any sense be deemed to be privileged, and was actionable.

A malicious intent or an intent to damage the reputation of a person is not a necessary ingredient of actionable slander.

Costs of suit were allowed to the plaintiff in full, although he had valued his claim for damages at Rs. 5,100 and the court had allowed only Rs. 200, in the absence of evidence to establish either loss of trade or any other actual loss.

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"GOOD FAITH", <i>See</i> Indian Penal Code, section 499, exception 9	313
GUARDIAN AND WARD— <i>Heir of deceased guardian in possession of ward's property—Order calling for accounts from person not appointed guardian—Order directing him to pay a certain sum upon the accounts—Jurisdiction.</i> On the death of a guardian appointed by court under the Guardians and Wards Act, his heir remained in possession of the ward's property, though the heir was never appointed guardian. Subsequently the court appointed another person as guardian and ordered the heir to furnish accounts of the minor's property in his hands. Accounts being furnished accordingly, they were scrutinized and thereupon the court ordered the heir to pay a certain amount over to the newly appointed guardian. <i>Held</i> that the Judge had no jurisdiction to make an order against the heir, who was not a guardian appointed by him but was in possession of the minor's property as a trespasser. The proper remedy was to direct the newly appointed guardian to institute a suit for accounts against him.	
Chandrika Rai v. Srikant Rai, I. L. R., 51 All.	899
GUARDIAN AND WARD—Starting a new speculative business is beyond powers of guardian—Contracts relating thereto are voidable	1027
HEARSAY EVIDENCE—Suspicion, <i>See</i> Criminal Procedure Code, sections 110 and 117(4)	275
HIGH COURT'S POWER OF INTERFERENCE—Search and seizure of property by Magistrate on complaint of an offence requiring sanction, <i>See</i> Criminal Procedure Code, sections 190, 197, 202, 561A	377
HINDU LAW—Adoption— <i>Authority to adopt given by a member of a joint Hindu family.</i> There is nothing to prevent a Hindu who is a member of a joint family giving a valid authority to his wife to adopt a son to him after his death, and the exercise of such authority is not dependent on her inheriting as a Hindu female owner her husband's estate. Such an authority cannot be considered to be extinguished by reason of the other member or members of the husband's family having succeeded to the estate by survivorship.	

*Mussumat Bhoobun Moyee Debia v. Ram Kishore Acharj Chowdhury*, 10 Moo. I. A., 279, *Sivagnanam Servaigar v. Ramaswamy Chettiar*, 22 M. L. J., 85, *Madana Mohana v. Purshothama*, I. L. R., 38 Mad., 1105, *Venkataramier v. Gopalan*, 35 M. L. J., 698, *Bachoo v. Mankorebat*, I. L. R., 31 Bom., 373, and *Pratap Singh Shivsingh v. Agarsingji Rajasangji*, I. L. R., 43 Bom., 778, referred to.

*Bhimabai v. Tayappa Murarrao*, I. L. R., 37 Bom., 598. *Adivewa Fakirgowda v. Channmallgowda Ramangowda*, 26 Bom. L. R., 360, and *Chandra v. Gojarabai*, I. L. R., 14 Bcm., 463, distinguished.

*Hira Lal v. Piari Lal*, I. L. R., 51 All. ...

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**HINDU LAW**—Act No. IX of 1908 (*Indian Limitation Act*), articles 141, 144—*Adverse possession*—*Suit by reversioners to recover property which was held adversely as against a Hindu female heir—Whether adverse possession against a Hindu female is adverse possession as against the reversioners.*] A Hindu widow, who had succeeded to the estate of her husband, died in 1894, leaving a daughter as the heir. The daughter, however, never got possession, as her father's collaterals took possession of the estate adversely to her. She did not sue them to recover possession and died in 1920. Her sons, who inherited the estate, sued these collaterals for possession in 1923. The defendants pleaded limitation by reason of their adverse possession for over 12 years, and the question arose as to what extent and under what circumstances adverse possession, as against a Hindu female heir, would bind the reversioners. *Held*,—

SULAIMAN, A.C.J., and MUKERJI, J.—Article 141, and not article 144, of the Limitation Act applied to the suit, which, having been brought within 12 years of the death of the daughter, was not barred by limitation.

No question of adverse possession arose in the *Shivagunga* case, 9 Moo. I.A., 539, and the rule in that case was not a rule of limitation or adverse possession, but a rule of Hindu law that the estate vested in a Hindu widow and that a decree against her, if fairly obtained, was binding on the reversioners. Even assuming that a rule of limitation had been laid down by that case, it must be deemed to have been superseded by the enactment of article 141 in the Limitation Act of 1877.

The case of *Vaithialinga Mudaliar v. Srirangath Anni*, I.L.R., 48 Mad., 883, did not lay down that article 141 of the Limitation Act was inapplicable to a suit like the present, or that the rule laid down in *Runchordas'* case, I.L.R., 23 Bom., 725, was no longer good law.

*Per* MUKERJI, J.—Adverse possession against a Hindu female heir will not be effective against and binding on the reversioners.

*Per* BOYS, J.—The rule in *Shivagunga's* case, which was affirmed in the case of *Vaithialinga Mudaliar* at page 904 of I.L.R., 48 Madras, was the initial main rule,—that there are cases in which the widow represents the estate so that acts and omissions by her may bind the reversioners. No pronouncement was made, either formally or by way of *obiter dictum*, on the effects of adverse possession against the widow.

The correctness of the decision in *Runchordas'* case was not in any way challenged or doubted in *Vaithialinga's* case, but the discussion of the former in the latter case does narrow the scope of *Runchordas'* case, showing that it is not, as it has been treated

as being, authority for any broad proposition that a Hindu widow does not, in the matter of adverse possession, where there is no decree, ever so represent the estate that the reversioners will be bound by adverse possession running for 12 years against her.

The question whether a reversioner is barred by adverse possession against the widow on the basis that she represented the estate, thus coming within the main rule of *Shivagunga's* case, would probably have to be decided, as in the case of decrees, on the facts of the particular case.

The following cases were also referred to:—*Lachhan Kunwar v. Manorath Ram*, I.L.R., 22 Cal., 445, *Ram Kali v. Kedar Nath*, I.L.R., 14 All., 156, *Anrit Dhar v. Bindesri Prasad*, I.L.R., 23 All., 448, *Jagadamba v. Dakkhina Mohun*, I.L.R., 13 Cal., 308, *Hari Nath v. Mothurmohun*, I.L.R., 21 Cal., 8, *Saroda Soondury v. Doyamoyee*, I.L.R., 5 Cal., 938, *Srinath Kur v. Prosunno Kumar*, I.L.R., 9 Cal., 934, and *Tika Ram v. Shama Charan*, I.L.R., 20 All., 42.

*Bankey Lal v. Raghunath Sahai*, I.L.R., 51 All. ... 188

**HINDU LAW**—*Alienation by manager*—*Permanent lease of agricultural lands*—*Suit by minor brother for avoidance and possession*—*Benefit to the estate*—*Extent of relief against agricultural lessees*—*Act (Local) No. III of 1926 (Agra Tenancy Act), section 45.*] The manager (elder brother) of a joint Hindu family granted a permanent lease of agricultural lands, being joint family property, to tenants at a favourable rate of rent, having taken from them a certain sum as *nazrana*. A minor brother sued for avoidance of the lease and for possession.

*Held* (1) that a permanent lease was an "alienation" of the property;

(2) that the validity of the alienation was to be judged not from whether it was a good business transaction but from whether the permanent lease or the cash *nazrana* was for the benefit of the family;

(3) that the alienation being held to be invalid, the relief obtainable by the plaintiff was not that of possession by ejectment of the lessees, who were not trespassers but had become agricultural tenants, but that of getting a proper rent fixed under section 45 of the Agra Tenancy Act, 1926. *Palaniappa Chetty v. Sreemath Daivasikamony Pandara Sannadhi*, I. L. R., 40 Mad., 709, referred to. *Jagat Narain v. Mathura Das*, I. L. R., 50 All., 969, followed. *Abdul Rahman v. Sukhdalay Singh*, 2 A. L. J., 507, and *Ram Chand v. Raj Hans* 3 A. L. J. 517, distinguished.

*Basdeo Narain v. Muhammad Yusuf*, I. L. R., 51 All. ... 285

**HINDU LAW**—*Hindu widow purchasing property*—*Accretion to husband's estate or stridhan*—*Burden of proof*—*Presumption.*] There is no presumption in law that the money with which a Hindu widow in possession of her husband's estate makes a purchase of property came out of the avigs from her husband's estate. The burden is on the reversioner who, after the death of the widow, claims to recover such property from the person in possession to establish that the property was acquire out of such savings. *Dakhina Kali Debi v. Jagdishwar Bhattacharjee*, 2 C. W. N., 197, and *Diwan Ran Bijai Bahadur Singh v. Indarpal Singh*, I. L. R., 26 Cal., 871 referred to.

*Baikunth Nath v. Jai Kishun*, I. L. R., 51 All. ... 341

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HINDU LAW—Joint family property—Alienation—Legal necessity—Property sold for more than was needed to pay off family debts:] The sale of a house belonging to a joint Hindu family was challenged on the ground of absence of necessity and it was found that the price was Rs. 1,400, out of which Rs. 967 were needed for legitimate family purposes.

*Held* that the result of this finding would not be the setting aside of the sale conditional on a refund of Rs. 967: but it was necessary to ascertain whether there was any other way in which the sum of Rs. 967 could have been raised by the joint family except by the sale of the house in suit, and an issue was remitted accordingly.

*Sri Krishan Das v. Nathu Ram*, I. L. R., 49 All., 149 and *Gauri Shankar v. Jiwan Singh*, 25 A. L. J., 967, followed.

*Murli v. Ghammar*, I. L. R., 51 All. ... 61

HINDU LAW—Joint family property—Alienation by father—Legal necessity—Burden of proof—Suit by sons before property is sold in execution of mortgage decree obtained against father—Sons' failure to prove immorality of debt immaterial.] In a joint Hindu family governed by the Mitakshara, consisting of a father and his sons, the father made a mortgage of joint family property. The mortgagee sued on the mortgage, without impleading the sons, and obtained a decree for sale. After the decree, but before the sale could take place, the sons brought a suit against the mortgagee, challenging the validity of the mortgage. The sons failed to establish that the debt was tainted with immorality and the mortgagee failed to establish legal necessity. There was no question of an antecedent debt.

*Held* that, in these circumstances, the mortgagee having failed to establish legal necessity for the loan, the sons' suit must succeed although they had failed to prove that the debt was of an immoral character. The case was governed by the third, and not by the second, of the five propositions of Hindu law laid down by the Privy Council in *Brij Narain v. Mangal Prasad*, I. L. R., 46 All., 95.

*Per* MUKERJI and BOYS, JJ.:—The second proposition did not apply, because the word "debt" contained in that proposition did not contemplate a mortgage debt but only an unsecured debt.

*Per* SULAIMAN, A. C. J.:—The word "debt" in the second proposition included a mortgage debt, but that proposition did not apply to this case as no auction sale had taken place and the property had not yet passed out of the family.

*Brij Narain v. Mangal Prasad*, I. L. R., 46 All., 95, *Sahu Ram Chandra v. Bhup Singh*, I. L. R., 39 All., 437, *Bhagbut Pershad Singh v. Girja Koer*, I. L. R., 15 Cal., 717, *Suraj Bansi Koer v. Sheo Persad Singh*, I. L. R., 5 Cal., 148, *Gauri Shankar v. Jang Bahadur*, 27 Oudh Cases, 124, *Gajadhar Pande v. Jadubir Pande*, I. L. R., 47 All., 122, *Nanomi Babunsin v. Modhun Mohun*, I. L. R., 13 Cal., 21, *Chandradeo Singh v. Mata Prasad*, I. L. R., 31 All., 176, *Lal Singh v. Jagraj Singh*, I. L. R., 50 All., 546, and *Nand Lal v. Umrai*, 29 Oudh Cases, 260, referred to.

*Jagdish Prasad v. Hoshyar Singh*, I. L. R., 51 All. ... 136

HINDU LAW—Joint family property—Alienation by father—Legal necessity for part only of sale consideration—Sale necessary to raise the money—"Sale itself for legal necessity."] Upon a sale of joint family property by a Hindu father his minor son brought a

suit to have it set aside on the ground that the sale was not for legal necessity. As ultimately found, Rs. 525 out of Rs. 1,000, the sale consideration, was for a valid antecedent debt; the remainder was found by the trial court to have been for legal necessity, but the lower appellate court expressed no clear finding about it. *Held*, on appeal—

The main question to be decided in cases of this kind was whether the sale was for legal necessity, that is to say, was there a necessity for the sale of that property? The sum of Rs. 525 had to be raised and the Court was satisfied that it could only be raised by a sale; the point whether the remainder of the sale consideration was or was not found to have been for legal necessity became immaterial. If it was once conceded that the sale was for legal necessity, it was not for the vendee to pursue each and every item of the consideration and ascertain how it was applied. *Sri Krishan Das v. Nathu Ram*, I. L. R., 49 All., 149, *Gauri Shankar v. Jiwan Singh*, 25 A. L. J., 967 and *Hunooman Persaud Panday v. Babooee Munraj Koonwerree*, 6 Moo. I. A., 393, referred to.

*Shyam Lal v. Badri Prasad*, I. L. R., 51 All. ... 1039

**HINDU LAW**—*Joint Hindu family—Alienation by father—Mortgage for payment of a pre-emption decree—Antecedent debt—Pre-emption decree not a debt—“Benefit to the estate”—Mortgage binding on pre-empted property.*] A pre-emption decree gives an option to the pre-emptor to obtain the property on making payment, but does not carry any order for payment, it is, therefore, not a “debt” in the proper sense of the term and cannot constitute an antecedent debt. *Nathu v. Kundan Lal*, 7 A. L. J., 1182, and *Kapildeo v. Thakur Prasad* 11 A. L. J., 961, dissented from. *Bhagwan Das v. Mahadeo Prasad*, I. L. R., 45 All., 390, and *Shankar Sahai v. Bechu Ram*, I. L. R., 47 All., 381, followed.

Ordinarily a Hindu father cannot mortgage joint ancestral property for the purpose of making payment in compliance with the terms of a pre-emption decree obtained by him for the purchase of fresh property. *Shankar Sahai v. Bechu Ram*, I. L. R., 47 All., 381, followed. *Jagat Narain v. Mathura Das*, I. L. R., 50 All., 969, referred to.

Where, with the mortgage money the pre-emption decree was complied with, and the property obtained by pre-emption was included in the mortgage, the mortgage was binding and effective as regards the pre-empted property.

*Kishen Sahai v. Raghunath Singh*, I. L. R., 51 All. ... 473

**HINDU LAW**—*Joint family property—Alienation by manager—Legal necessity for part of sale price—Purchaser making due inquiry—Sale for adequate price.*] A Hindu father, who with his minor sons constitute a joint Hindu family, sold a part of the family property, on which as well as on another part there was a pre-existing mortgage. By means of the sale the mortgage debts were satisfied and a part of the mortgaged property was freed from mortgage and was saved to the family. About 14 years later, the sons brought a suit to recover possession of the property sold, on the ground that the sale by the father was invalid. Upon the findings (1) that the sale itself was one which was justified by legal necessity, (2) that due inquiries as to the necessity had been made by or on behalf of the purchaser before the sale was effected, (3) that the sale was for adequate consideration, and (4) that legal necessity was proved by the defendant vendee to the extent of Rs. 7,744 out of a total price

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of Rs. 10,767, it was held that the sale must stand and that the fact that the defendant vendee after a long interval of time, was not able to prove conclusively how the surplus was applied by the vendor was not sufficient ground for setting aside the sale.

*Hunoomanpersaud Panday v. Babooee Munraj Koonweree*, 6 Moo. I. A., 393, *Masit Ullah v. Damodar Prasad*, I. L. R., 48 All., 518, and *Sri Krishan Das v. Nathu Ram*, I. L. R., 49 All., 149, followed.

*Ram Sunder Lal v. Lachhmi Narain*, I. L. R., 51 All. 430.

**HINDU LAW**—*Joint family*—*Partition*—*Facts necessary to constitute separation—Intention of members.*] Partition is the severance of the status of a joint family, which may be effected by the exercise of individual volition indicating an intention to separate from the other members of the family.

The said intention must be manifested clearly and unambiguously.

The intention to separate may be established either by explicit declaration or from an uniform and consistent course of conduct of the party concerned or of other members of the family. The intention may be declared orally or in writing, and may manifest itself from the filing of a plaint for partition, from an application for mutation of names to the Tahsildar in specific shares with a view to separate enjoyment, from a written notice served upon the members of the family demanding a partition of the property, from an agreement executed by the various members of the family whereby the shares of the individual members are defined with the object of securing separate enjoyment of the profits, or from an agreement of reference to arbitration for the partition of the property. Instances like these may be enumerated but cannot be exhausted.

It is not necessary that there should be a consensus or agreement among the coparceners for the severance of status of a joint family.

Where severance is effected by explicit declaration, the result is decisive, and the legal result cannot be affected or controlled by the subsequent conduct of the parties.

In the absence of an explicit declaration, an inference in support of the intention may be drawn from evidence of conduct which will necessarily be different according to the varying postures of each case.

Where there is evidence of intention to separate, this can only be annulled by clear evidence of the renunciation of such intention, and, in some cases, by consensus or agreement on the part of the members of the family to re-unite.

Partition may also result from a definement or ascertainment of shares with a view to separate enjoyment of property.

The separation of one member of a coparcenary is not necessarily a separation of the other members *inter se*.

*Baboo Doorga Pershad v. Mussumat Kundun Koowar*, I. L. R., 1 I. A., 55, *Appovier v. Rama Subba Aiyar*, 11 Moo. I. A., 75, *Parbati v. Naunihal Singh*, I. L. R., 31 All., 412, *Palani Ammal v. Muthuvenkatachala Moniagar*, I. L. R., 48 Mad., 254; *Suraj Narain v. Iqbal Narain*, I. L. R., 35 All., 80, *Jai Narain Rai v. Baijnath Rai*, I. L. R., 50 All., 615, *Ramalinga Annavi v. Narayana Annavi*, I. L. R., 45 Mad., 489, *Mukund Dharman Bhoir v. Balkrishna Padmanji*, I. L. R., 52 Bom., 8, *Joy Narain Giri v. Girish Chunder Myti*, I. L. R., 4 Cal.,

434, *Girja Bai v. Sadashiv Dhundiraj*, I. L. R., 43 Cal., 1031, *Kawal Nain v. Budh Singh*, I. L. R., 39 All., 496, *Challa Lakshmaika v. Challa Bala Rangappa*, 91 Indian Cases, 285, *Periaswami Nainar v. Kandasami Nainar*, 99 Indian Cases, 720, *Syed Kasam v. Jorawar Singh*, I. L. R., 50 Cal., 84, *Kedar Nath v. Ratan Singh*, I. L. R., 32 All., 415, and *Balkishen Das v. Ram Narain Sahu*, I. L. R., 30 Cal., 738, referred to.

*Ram Kali v. Khamman Lal*, I. L. R., 51 All. ... 1

**HINDU LAW**—*Partition*—*Notice by one member demanding partition—Revocation—Intention of partition dropped, by subsequent agreement of parties—Whether notice per se effects partition.*] Where a member of a joint Hindu family sent a registered notice to the other members demanding a partition, but the intention to separate was given up a day or two later as the result of a subsequent agreement of the members at a family meeting and there was no disruption of the family in fact: *Held* that the notice in these circumstances did not, by itself, operate to effect a separation in law. An unequivocal demand for partition which has not been persisted in and has been withdrawn or abandoned with the consent of the other members of the family, can not be treated as nevertheless effecting a separation.

*Ram Kali v. Khamman Lal*, I. L. R., 51 All., 1, *Jai Narain Rai v. Baijnath Rai*, I. L. R., 32 All., 415, *Kedar Nath v. Ratan Singh*, I. L. R., 50 All., 615, and *Palani Ammal v. Muthuvenkatachala Moniagar*, I. L. R., 48 Mad., 254, referred to.

*Banke Bihari v. Brij Bihari*, I. L. R., 51 All. ... 519

**HINDU LAW**—*Partnership between a coparcener and strangers—Liability of other coparceners, See Act No. IX of 1872 (Contract Act), section 239* ... 827

**HINDU LAW**—*Religious endowment—Dedication to idol—Revocation—Adverse possession as against idol by donor himself.*] In the absence of fraud, undue influence and misrepresentation, if a valid dedication has once been completed, there would be no power left in the donor to revoke it. And no assertion on his part or subsequent conduct contrary to such dedication would have the effect of nullifying it.

Adverse possession exercised by the donor himself, to the ouster and knowledge of the *shebait* who alone held the property on behalf of the idol, would mature into title after the lapse of the prescribed period.

*Sri Thakurji v. Sukhdeo Singh*, I. L. R., 42 All., 395, and *Ram Dhan v. Prayag Narain*, I. L. R., 43 All., 503, distinguished. *Jadu Nath Singh v. Thakur Sita Ramji*, I. L. R., 39 All., 553, referred to. *Jagadindra Nath Roy v. Hemanta Kumari Debi*, I. L. R., 32 Cal., 129, *Chit'ar Mal v. Panchu Lal*, I. L. R., 48 All., 348 and *Damodar Das v. Lakhnan Das*, I. L. R., 37 Cal., 885, followed.

*Dasami Sahu v. Param Shameshwar*, I. L. R., 51 All. 621

**HINDU LAW**—*Son's liability for father's debts—Immoral origin of debt—Misappropriation by father amounting only to breach of civil duty as agent—Criminality not established.*] The secretary of a school committee, having obtained the sanction of the committee, drew cheques on the School Building Fund for the construction of a building which he undertook to get built. There was nothing to show that he had any dishonest purpose in the beginning. Later on, he got into difficulties and dishonestly drew cheques on the General Fund of the School in an irregular way and by misleading the president and members of the com-



mittee as to the position of affairs, but it could not be found from the facts whether he was guilty of a criminal offence. He submitted certain accounts of the expenditure on the building, and acknowledged his liability to account for the unspent balance and, shortly after, died. The accounts were found to be unreliable incomplete and utterly inadequate. In a suit by the school committee against the sons, *Held* that the sons were liable, to the extent of the father's assets and the joint family property, for the excess of the amount drawn by the father over that of the value of the building.

A Hindu son is not bound to pay his father's debt if the liability arises directly from a criminal act, i.e., an act for which the father might or might not have been successfully prosecuted but which the evidence on the record is sufficient to prove to have been criminal. If, however, there is a civil liability, and subsequently the transaction becomes a criminal one, the son is bound to meet the civil liability to the extent of the family property, and the son's liability is in no way altered by the subsequent criminal act. Where the obligation itself is not infected with criminality and it is possible to separate the civil liability from the subsequent crime, the civil liability itself is not so infected.

Toshanpal Singh v. The District Judge of Agra, I. L. R.,  
51 All. ... 386

**HINDU LAW**—*Sons' liability for father's debts—Pre-partition debts of father—Partition between father and sons after creditor's suit against father—Attachment before judgement—Execution of decree against divided sons—Suit for partition by minor sons—Whether such suit of itself effects separation—Bona fides of partition.* A joint Hindu family consisted of a father and his two minor sons. The father incurred debts on promissory notes and the creditor sued the father alone for recovery of his money and also got the family property attached before judgement. Thereupon the minor sons brought a suit for partition of their share against the father; to this suit the creditor was not made a party. The creditor's suit was decreed first. Later, the suit for partition was decreed *ex parte* and then the sons sued for a declaration that the two-thirds share which the partition decree declared them to have in the family property was not liable to be proceeded against in execution of the decree obtained by the creditor.

*Held* that the sons' share, separated by the partition, could be sold in execution of the creditor's decree against the father.

*Per* MUKERJI, J.:—If the well-wishers of the minor sons, believing they could save two-thirds of the property by suing for partition, sued for it and meant it to be effected, the partition was, in this sense, in good faith.

Partition not being an alienation but only an alteration in the mode of enjoyment by the same parties, the partition was not affected by the attachment before judgement.

The substantive right of the creditor, in the case of a father's debt not tainted with immorality, to proceed against the family property cannot be defeated by the father and sons coming to a partition. The family property does not cease to be the family property, or change its character or liability, because of a decision to enjoy it separately and no longer jointly by the father and sons. What was joint family property in the hands of the father at the date of his incurring the debt may be proceeded against by the creditor, although some of the property is now in the hands of the sons, to realise the decree passed against the father.

*Per NIAMAT-ULLAH, J.* :—The partition at the instance of the minor sons in the circumstances of the case was evidently promoted by a desire to defeat the rights of the creditor and was not made in good faith and could be ignored by the creditor.

Assuming the partition to have been made in good faith, the remedy of the creditor was not impaired thereby. The liability of the sons which arises before a partition between them and their father can not be affected by a partition which the father and sons may choose to make and to which the creditor is not a party.

The decree obtained against the father was binding on the sons as they would be deemed to have been represented by the father in the suit. Whether the sons were represented by the father or not depends upon the subject matter of the suit and if it was a debt which, not being tainted with immorality, was binding on the sons, the sons must be deemed to have been parties to the suit through the father.

But a decree obtained against a father after disruption of the family can not be executed against the sons; for after disruption the sons are no longer represented by the father in any suit brought by the creditor. In such a case if the creditor desires to proceed against the divided property in the hands of the sons he must obtain a decree against the sons themselves.

The filing of the suit for partition by the minor sons did not of itself effect a separation, inasmuch as it was a matter of discretion of the court to grant or refuse a partition at the instance of minors; and in such a case the separation would be deemed to take place only if and when a decree for partition was passed. In the present case the separation must, therefore, be deemed to have taken place after the creditor had obtained his decree.

*Subramania Ayyar v. Sabapathy Aiyar*, I. L. R., 51 Mad., 361 and *Jagannatha Rao v. Viswesam*, I. L. R., 47 Mad., 621, followed. *Vinjamampati Peda Venkanna v. Sreenivasa Deekshatulu*, I. L. R., 41 Mad., 136, disapproved. *Annabhat v. Shivappa*, I. L. R., 52 Bom. 376, and *Kulada Prasad v. Haripada Chatterjee*, I. L. R., 40 Cal., 407, approved. *Ram Ghulam v. Nand Kishore*, I. L. R., 4 Pat. 469, disapproved. *Sita Ram v. Beni Prasad*, I. L. R., 47 All., 263, approved. *Gaya Prasad v. Murlidhar*, I. L. R., 50 All., 137, disapproved. *Jageshwar v. Manni Ram*, I. L. R., 2 Luck., 561, approved. *Masit Ullah v. Damodar Prasad*, I. L. R., 48 All., 518, *Nanomi Babuasin v. Modhun Mohun*, I. L. R., 13 Cal., 21, *Brij Narain v. Mangal Prasad*, I. L. R., 46 All., 95 and *Sheo Shankar Ram v. Jaddo Kunwar*, I. L. R., 36 All., 383, referred to.

*Kishan Sarup v. Brijraj Singh*, I. L. R., 51 All. ... 932

**HINDU LAW**—*Sons renewing father's time-barred debt—Liability of sons to the extent of family property—Act No. IX of 1872 (Contract Act), section 25 (3).* Where a simple money bond was executed by Hindu sons in order to pay off a time-barred debt due from their father, it was held that the bond could be enforced against the sons only to the extent of the family property and not against them personally.

The words, "of which the creditor might have enforced payment", in section 25(3) of the Contract Act do not include a debt which was not payable by the executant of the subsequent promise himself. Section 25 (3) is meant to cover only the case of the person who would be liable to pay the debt but for its being time-barred. The sons were liable only to the extent of the family property. So, if the bond was deemed to come under section 25

(3), any agreement by the sons that they would pay personally would not be within it and would be invalid for want of consideration.

Asa Ram v. Karam Singh, I. L. R., 51 All. ... 989

HINDU LAW—Stridhan—Inheritance—*Daughter's daughter preferential heir over daughter's son.*] A daughter's daughter is a preferential heir, as against the daughter's son, to stridhan property left by their maternal grandmother, in cases where their mother predeceased her own mother. *Subramanian Chetti v. Aruna-chelam Chetti*, I. L. R., 28 Mad., 1, followed. *Sheo Shankar Lal v. Debi Sahai*, I. L. R., 25 All., 468, distinguished.

Amarjit Upadhiya v. Algu Chaube, I. L. R., 51 All. ... 478

IMPLIED COVENANT OF TITLE, *See* Act No. IV of 1882 (Transfer of Property Act), section 55(2) ... 651

INDIAN PENAL CODE, SECTIONS 161/116—*Abetment of bribery—Offering bribe for doing something which the public servant has no power to do—Absence of such power immaterial.*] It is sufficient to constitute an offence under section 161, read with section 116, of the Indian Penal Code that there was an offer of a bribe to a public servant, in the belief that he had an opportunity or power in the exercise of his official functions to show the offeror a desired favour, although the public servant had in reality no such power.

Emperor v. Ajudhia Prasad, I. L. R., 51 All. ... 467

INDIAN PENAL CODE, SECTION 211, *See* Criminal Procedure Code, sections 190(b), 195(1)(b) ... 382

INDIAN PENAL CODE, SECTION 336—*"Rashly or negligently"—Deliberate act not included—Indian Penal Code, section 153.*] A rash act is primarily an over-hasty act and is opposed to a deliberate act; even if it is partly deliberate, it is done without due thought and caution.

Where a *pujari* of a temple left the temple at night and from outside deliberately threw bricks at it, hoping that the Hindus of the locality would believe that the bricks came from the Muhammadan quarter and that this would lead to a riot between the two communities, *Held* that the act was a deliberate one and not a rash or negligent act within the meaning of section 336 of the Indian Penal Code; also, that the provisions of section 153 did not apply to the case.

Emperor v. Gaya Prasad, I. L. R., 51 All. ... 465

INDIAN PENAL CODE, SECTION 366A—*Procurator of minor girl—Offering the girl to several persons successively for sale—Whether fresh offence for each offer.*] An offence under section 366A, Indian Penal Code, is one of inducement with a particular object, and when, after the inducement, the offender offers the girl to several persons, a fresh offence is not committed at every fresh offer for sale.

Emperor v. Sis Ram, I. L. R., 51 All. ... 888

INDIAN PENAL CODE, SECTIONS 489A/511—*Attempt at counterfeiting currency notes—Product must be capable of causing deception—"Counterfeit"—Indian Penal Code, section 28.*] For a thing to be termed "counterfeit" according to the definition given in section 28 of the Indian Penal Code, there should be some sort of resemblance sufficient to cause deception. In a case of counterfeiting currency notes, where the ability of the accused persons and the capacity of the materials with which they worked were not such as to produce a currency note which would take in even

the most ignorant villager: *Held* there could be no conviction under section 489A, read with section 511 of the Indian Penal Code.

Emperor v. Jwala, I. L. R., 51 All. ... 470

INDIAN PENAL CODE, SECTION 499, EXCEPTION 9—*Defamation*—“*Good faith*”—*Proof of exact words used*—*Criminal Procedure Code, section 342*—*Statement of accused person—Conviction on such statement.*] In order to come within exception 9 to section 499 of the Indian Penal Code the imputation must have been made by the accused person in good faith for the protection of the interest of himself or any other person. It is not sufficient that the person making the imputation believed in good faith that he was acting for the protection of any such interest.

*Per* MUKERJI, J.—Although it can not be laid down as a universal proposition that in no case where the actual words used have not been proved can a conviction for defamation by word of mouth be maintained, yet in the majority of cases it should be so. The court must be put in possession of the words used and also of the context in which they were used, and not merely of the impression of the words and their context left on the minds of the witnesses, in order to find the intention and the effect of the words.

The examination of an accused person under section 342 of the Code of Criminal Procedure is not meant to supply any deficiency that may exist in the prosecution evidence. But if, on the whole of the statement of the accused person taken together, his guilt is established, there cannot be any bar to a conviction simply because the prosecution evidence, by itself, would not have secured a conviction. He has nothing to complain of if his whole statement is accepted and he is convicted on it.

*Per* KING, J.—It is unnecessary to prove the exact words used by the accused, for the purpose of supporting a conviction for oral defamation. A witness' failure to recall the exact words used or the exact context in which they were spoken is immaterial, provided that he can give a sufficiently clear account of the purport of the defamatory remarks.

If the prosecution evidence were discarded as worthless, there would be no necessity or justification for questioning the accused person, under section 342 of the Code of Criminal Procedure, at all and it is doubtful whether the accused person could in such a case be rightly convicted merely on his own statement.

Emperor v. Col. Bhola Nath, I. L. R., 51 All. ... 313

INSTALMENT DECREE—*Instalments not directed to be payable only in court—Date for payment expiring on court holiday—Deposit on re-opening of court—Validity of payment.*] An instalment decree made the first instalment payable on a certain date, but it did not direct that the amount was to be deposited in court. The date specified expired during the vacation of the court, and the amount was tendered in court on the re-opening day. *Held* that as the judgement-debtors had the power to make the payment direct to the decree-holders, and depositing it in court was not the only course open to them, they could not take advantage of the fact that the court was closed on the specified date and the payment made by them was not made in time. *Muhammed Jan v. Shiam Lal*, I. L. R., 46 All., 328, distinguished.

Kunj Bihari v. Bindeshri Prasad, I. L. R., 51 All. ... 527

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JOINT PROPERTY—Co-sharers in zamindari and sir—Separate possession of one co-sharer over a part—Suit for joint possession by co-sharer out of possession—Form of relief—Discretion of court.] A decree for joint possession can be granted to one co-sharer against another under the provisions of the Code of Civil Procedure of 1908 even though the plaintiff has not been in actual possession.	

The court has some discretion in the matter of granting such a decree, as exemplified in the case of *Watson and Co. v. Ramchund Dutt*, I. L. R., 18 Cal., 10, and it has to be exercised by considering the rights and interests of the parties and a decree for joint possession cannot be refused on the mere ground that it would be impracticable or inadvisable for reasons unconnected with the rights of the parties.

Where parties were joint owners of several zamindari properties, out of which certain sir plots had been in the separate possession of the defendant for over 24 years, and the plaintiff used to get his share of the profits of those plots from the defendant, and the defendant never denied the plaintiff's title, held, the court should, in its discretion, refuse to disturb the defendant's possession by giving the plaintiff a decree for joint possession. *Watson and Co. v. Ramchund Dutt*, I. L. R., 18 Cal., 10, followed. *Jagar Nath Singh v. Jai Nath Singh*, I. L. R., 27 All., 88, *Jagarnath Ojha v. Ram Phal*, I. L. R., 34 All., 150, *Ram Charan Rai v. Kauleshar Rai*, I. L. R., 27 All., 153, and *Bhairon Rai v. Saran Rai*, I. L. R., 26 All., 588, referred to. *Bisheshar Singh v. Hanuman Singh*, I. L. R., 44 All., 1, *Sarabjit Singh v. Raj Kumar Rai*, I. L. R., 44 All., 5, and *Bhirgunath Rai v. Apnarain Rai*, I. L. R., 45 All., 157, distinguished.

*Hanuman Prasad Singh v. Mathura Prasad Singh*, I. L. R., 51 All. ... 308

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**JURISDICTION**—Civil and revenue courts—Suit to recover amount of revenue paid by a person wrongly recorded as lambardar—Act (Local) No. II of 1901 (Agra Tenancy Act), sections 159 and 160—Payment not voluntary—Payment lawfully made—Act No. IX of 1872 (Contract Act), section 70.] The plaintiff, who was recorded as lambardar of a certain property, paid a certain sum of money as Government revenue on citation being issued to him by the revenue authorities. At that time, though recorded as lambardar, he had sold his property to the defendants, who were really liable to pay the revenue. He then sued the defendants in the court of Small Causes for recovery of the sum. He was then no longer lambardar or co-sharer. The defence was that such a suit was cognizable by a revenue court and that the payment, being voluntary, was not recoverable.

*Held* that no suit could lie in the revenue court because the plaintiff was no longer lambardar or co-sharer and could not sue, either under section 159 or section 160 of the Tenancy Act of 1901.

*Held* also, that the payment was not gratuitous and was made lawfully because the plaintiff, whose name continued to be recorded as lambardar, was bound to make the payment and the case fell within the purview of section 70 of the Contract Act.

*Tulsa Kunwar v. Jageshar Prasad*, I. L. R., 28 All., 568, and *Nath Prasad v. Baij Nath*, I. L. R., 3 All., 66 followed. *Chunia v. Kundan Lal*, Weekly Notes, 1882, p. 150, distinguished.

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MORTGAGE—Subrogation—Property comprised in second mortgage being a fraction of that in the first—Third mortgagee and another person together paying off first mortgage—Third mortgagee gets priority over the second to the extent of a corresponding fraction of his contribution.] Where the third mortgagee and another person together paid off the first mortgage in full, held, on suit by the second mortgagee, that the third mortgagee was entitled to priority over the second to the extent of the sum which he had contributed for the discharge of the first mortgage; but as the property comprised in the second mortgage was only a fraction of that comprised in the first, the right of priority would be limited to the corresponding fraction of the amount contributed.	
<i>Hanumanthaiyan v. Meenatchi Naidu</i> , I. L. R., 35 Mad., 189, distinguished. <i>Saminatha Pillai v. Krishna Ayyar</i> , I. L. R., 38 Mad., 518, followed.	
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MUHAMMADAN LAW—*Waqf—Shias—Waqf-al-ul-aulad*—"Family" of *waqf—Daughter-in-law—Act No. VI of 1913 (Musalman Waqf Validating Act), section 3—Act (Local) No. I of 1923 (Bundelkhand Encumbered Estates Act), section 10.] Held on a construction of a deed of waqf executed by a Shia Muhammadan mainly for the benefit of his son and daughter-in-law:—*

(1) that the daughter-in-law would be included in the term "family" as used in section 3 (a) of the Musalman Waqf Validating Act, 1913;

(2) that the fact that part of the endowed property was subject to a mortgage and part was subject to a charge imposed under the provisions of the Bundelkhand Encumbered Estates Act, 1903, and the deed directed these incumbrances to be discharged, did not affect the validity of the *waqf*. *Hamid Ali v. Mujawar Husain Khan*, I. L. R., 24 All., 257, referred to.

(3) that part of the endowed property, being within an area to which the Bundelkhand Encumbered Estates Act, 1903, applied, and having been made the subject of a settlement for the liquidation of debts under the Act, could not be made *waqf*, having regard to section 10 (2) (a). The word "give" as used in that section is not confined to the restricted sense in which it is used in the Transfer of Property Act, 1882, but would include the dedication of property by way of *waqf*. *Sadik Husain Khan v. Hashim Ali Khan*, I. L. R., 38 All., 627, referred to.

*Musharraf Begam v. Sikandar Jahan Begam*, I. L. R., 51 All. ... 40

MUHAMMADAN LAW—*Waqf—Waqf-al-ul-aulad—Private or public trust—Civil Procedure Code, section 92.] A "Waqf-al-ul-aulad" in Muhammadan law is not, generally speaking, a public trust of the kind to which section 92 of the Civil Procedure Code applies, and the fact that a very small portion of the income of the waqf property may be assigned to purposes of a charitable nature will not make it so.*

*Mahomed Ismail Ariff v. Ahmad Moolla Dawood*, I. L. R., 43 Cal., 1085, *Williams v. Kershaw*, 5 Cl. and F., 111, *Attorney-General for New Zealand v. Brown*, [1917] A. C., 393, *Mahomed Ahsanullah Chowdhry v. Amarchand Kundu*, I. L. R., 17 Cal., 498, *Mujib-un-nissa v. Abdur Rahim*, I. L. R., 23 All., 233, *Muhammad Munawar Ali v. Razia Bibi*, I. L. R., 27 Cal., 320, *Sajedur Raja Chowdhuri v. Gour Mohun Das Baishnav*, I. L. R., 24 Cal., 418, *Muhammad Ibrahim Khan v. Ahmad Said Khan*, I. L. R., 32 All., 503, *Muhammad Abdul Majid Khan v. Ahmad Said Khan*, I. L. R., 35 All., 459, *Pattu Lal v. Daya Nand*, I. L. R., 44 All., 721, and *Abdur Rahim v. Mahomed Barkat Ali*, I. L. R., 55 Cal., 519, referred to.

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A stranger-purchaser cannot be required to submit to a partial pre-emption, nor is he entitled to demand it.	
Wajid Ali Khan <i>v.</i> Puran Singh, I. L. R., 51 All.	267
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<p>The custom of privacy, where it exists, should not be carried to an oppressive length, and where there is an easy remedy, e.g., the putting up of <i>chicks</i> in his windows, available to a plaintiff, he should not have any relief except by way of damages, at the outside.</p>	
Bhagwan Das v. Zamurrad Husain, I. L. R., 51 All. ...	986
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*Bansi Ram v. B. N.-W. Railway*, I. L. R., 51 All. ... 480

**RAILWAY—Travelling by longer but quicker route—Excess fare—Indian Railways Coaching Tariff, Rules 63, 64.]** A passenger after purchasing a ticket from Agra to Moradabad via Aligarh and Chandausi discovered that if he travelled beyond Aligarh and via Ghaziabad he would reach his destination more quickly than by the route indicated on the ticket, although he would be travelling by a longer route. He did travel accordingly and on arrival at Moradabad he was made to pay excess fare. On suit for refund, *Held* that rule 64 of the Indian Railways Coaching Tariff applies to a passenger who is found travelling, either intentionally or by mistake, by a route other than that indicated on the ticket and not to a passenger who has arrived at his destination, and that the case was governed by rule 63 and the excess fare was justified.

*Secretary of State for India in Council v. Murli Manohar*  
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upon which they used marks which would be apt to be confused with the respondents' mark by illiterate and unobservant people, and to be accepted by purchasers wishing to buy "lotus" cloth. The respondents brought a suit against the appellants for passing off; they claimed damages, giving up a claim to an account of profits. The High Court held the appellants liable. In assessing damages the Court assumed that 60 per cent. of the sales made by the appellants of goods bearing the offending mark were due to the use of that mark, and awarded the respondents 9 per cent. of the sale price of the 60 per cent. as the profit thereon lost to the respondents.

*Held* that in the circumstances above stated the respondents' cause of action was established; but that the assumption made in assessing the damages was far too speculative. Though no definite rule could be laid down for estimating the damages in such a case it would be safer to award a sum representing the profit (at 9 per cent.) upon the falling off in the respondents' sales after the offending mark was used, together with a sum representing the profit upon an increase which might have taken place in their trade.

*Johnston v. Orr Ewing*, 7 App. Cas., 219, applied.

*Juggi Lal, Kamalapat v. Swadeshi Mills Company, Ltd.*,

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